CHAPTER 2
MISCONDUCT

2.2.1 Introduction....1
The Statute....2
2.2.2 Attendance / Tardiness....2
The Employer's Policy....2
Prior Warnings....3
Unexcused Absences....3
Excused Absences....4
No Call / No Show....5
2.2.3 Alcohol / Drug Use....5
The Employer's Policy....6
Workplace Conduct....7
Drug / Alcohol Testing....9
2.2.4 Altercations....11
Physical Altercations....11
Threats....12
Verbal Altercations....13
2.2.5 Criminal Conduct....13
Evidence of Criminal Activity....14
Off-the-job Behavior....17
Felony Misconduct....22
Procedural Concerns: Holding a Hearing During Pendency of Criminal Proceedings....22
2.2.6 Insubordination....23
Failure to Obey a Directive....23
Abusive Behavior....27
2.2.7 Document Falsification....28
Time Records....29
Application for Employment....29

Medical Records....29
2.2.8 Poor Performance vs. Pattern of Conduct....30
Persistent Negligence or Pattern of Behavior....30
Gross Negligence....31
Accidents....32
2.2.9 Social Media Issues....32
2.2.10 Discrimination and Retaliation....35
2.2.11 Protected Activities Under the National Labor Relations Act....38

2.2.1 INTRODUCTION

The term "misconduct" is not defined in the statute as you will see below. However, the Appellate Division has held that "misconduct" is behavior that is detrimental to the employer's interests or in violation of a reasonable work condition.[1] The claimant's actions need not be willful and/or wanton to rise to the level of misconduct.[2] Misconduct may be found in cases of gross negligence, indifference, or a pattern of recurrent carelessness.[3]

Circumstances which would not justify the imposition of a disqualification for misconduct, include: mere inefficiency, inadequate performance as the result of inability or incapacity, inadvertence or ordinary negligence in isolated instances, or good faith errors in judgment or discretion.[4] Board and Court decisions have indicated that "misconduct" may include acts or omissions off the job as well as on the job, if adverse effect on the employer is demonstrated.[5] Additionally, there must be a direct relation in point of time between the final incident and the termination,[6] and the final incident must be proved to be the direct cause of termination.

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[1] *See Matter of Clum,* 51 A.D.3d 1171 (3d Dep't 2008) ("Conduct that is 'detrimental to the employer's interest or in violation of a reasonable work condition' constitutes misconduct and will disqualify an employee from eligibility for unemployment insurance benefits") (citing *Matter of De Grego,* 39 N.Y.2d 180 (1976); *Matter of Maxwell,* 305 A.D.2d 954 (3d Dep't 2003), *lv denied* 100 N.Y.2d 511(2003); *Matter of Marten,* 255 A.D.2d 638 (3d Dep't 1998)).

[2] *Matter of Dunham*, 68 A.D.3d 1328 (3d Dep't 2009); *Matter of Clum*, 51 A.D.3d 1171 (3d Dep't 2008) ("To the extent that our prior cases have articulated a different standard or indicated that an employee's conduct *must* be willful and wanton in order to rise to the level of disqualifying misconduct, those cases should not be followed").

[3] *See* Pattern of Conduct, *infra*; *see also, Matter of Weinfeld,* 135 A.D.2d 880 (3d Dep't 1987) ("misconduct may be found where an employee is terminated for conduct which exceeds mere carelessness (*Matter of Sisco,* 63 A.D.2d 1094 (3d Dep't 1978) or for negligence which has persisted in spite of warnings (*Matter of Woods*, 52 A.D.2d 696 (3d Dep't 1976)").

[4] *See Matter of James,* 34 N.Y.2d 491 (1974); Appeal Board No. 575106 ("while actions which display inefficiency, negligence or bad judgment may provide valid causes for discharging an employee, they do not automatically disqualify a claimant from receiving benefits.") (*citing Matter of Arroyo*, 145 A.D.2d 886 (3d Dep't 1988)).

[5] *See Matter of Roy,* 138 A.D.3d 1284 (3d Dep't 2016) ("Claimant was obligated 'even during his off-duty hours, to honor the standards of behavior which his employer has a right to expect of him…and may be denied unemployment benefits as a result of misconduct in connection with his work if he fails to live up to this obligation"); *Matter of Markowitz,* 94 A.D.2d 155 (3d Dep't 1983) (claimant's felonious actions did not relate directly to his employment, however, he was a civil servant and his actions constituted a genuine threat to the integrity of the employer); *Matter of Moniz,* 126 A.D.3d 1251 (3d Dep't 2015) (in circumstance where claimant was involved in a physical altercation with co-worker at a bar outside of working hours, the relevant question is not where or when conduct occurred, but whether it was "in connection with" employment).

[6] *See* Appeal Board No. 549251 (citing Appeal Board Nos. 534021 and 515401); Appeal Board No. 551938 ("Appeal Board has long held that there must be a direct connection in time between actions asserted to be misconduct, and the termination of employment, in order to justify a disqualification of unemployment insurance benefits") (citing Appeal

THE STATUTE

Labor Law §593 (3) addresses the issue of misconduct. It states: "No days of total unemployment shall be deemed to occur after a claimant lost employment through misconduct in connection with his employment until he or she has subsequently worked in employment and earned remuneration at least equal to ten times his or her weekly benefit rate." Labor Law §527 indicates that a claimant cannot use wages from employment that ended due to misconduct in establishing a claimant for benefits.

2.2.2 ATTENDANCE / TARDINESS

It has long been held that continued absenteeism or tardiness in violation of the employer's policy, after warning and without a compelling reason for the last absence or tardiness constitutes misconduct.[7] It is also well-settled that the focus of the analysis for misconduct purposes is on the reason for the final absence / tardiness.[8]

THE EMPLOYER'S POLICY

Normally, employers have a policy forbidding excessive absenteeism. The wording of the policy will put the claimant on notice of the general parameters of acceptable attendance. There are times when an employer does not strictly adhere to its own attendance policy. This does not specifically negate a finding of misconduct[9] unless the evidence establishes that the employer's

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Board No. 540829); Appeal Board No. 573468 ("there must be a direct nexus in time between the alleged act and the discharge to establish misconduct, and if there is a delay, there must be a reasonable explanation for such delay"); Appeal Board No. 576748 ("It is well-established that there must be a direct nexus in time between the alleged act and the discharge to establish misconduct, and if there is a delay, there must be a reasonable explanation for such delay beyond mere convenience for the employer").

[7] *Matter of Kazaka,* 46 A.D.3d 1071 (3d Dep't 2007); *Matter of Morgan,* 42 A.D.3d 846 (3d Dep't 2007); *Matter of Patterson,* 50 A.D.2d 703 (3d Dep't 1975) ("Absenteeism, after a warning of the consequences upon recurrence, is equivalent to misconduct").

[8] *See* Appeal Board No. 555384 (although employer argued the decision to discharge was made in light of history of attendance infractions, the focus of the analysis for misconduct purposes was on the reason for the final absence); Appeal Board No. 585530 ("our focus is not on the prior pattern of absenteeism but the separate and distinct final incident … after he had worked the day before").

[9] *See* Appeal Board No. 574634 (the fact that the claimant incurred several absences after receiving a final warning did not negate the fact that she engaged in misconduct even though the employer did not adhere to its own attendance policy) (citing *Matter of Brown*, 83 A.D.3d 1231 (3d Dep't 2011) (Court reasoned that it was the employer's prerogative to determine if a claimant's actions rose to the level of misconduct warranting discharge even though the employer had not enforced its last chance agreement by allowing the claimant to commit other disciplinary infractions without consequences prior to being discharged)).

inaction misled the claimant into believing that he or she could continue to be late or absent with impunity.[10]

PRIOR WARNINGS

A warning is required in order for absenteeism and/or tardiness to rise to the level of misconduct.[11] The prior warning must be related to the behavior comprising the final incident.[12] It must also inform the claimant of the consequences of the particular type of attendance infraction, for example absence or lateness.[13] Additionally, the Board has repeatedly held that a warning issued in excess of one year before the final incident is too remote in time to constitute notice to a claimant that his or her employment could be in jeopardy.[14]

UNEXCUSED ABSENCES

A final occurrence of absence or tardiness has been found to rise to the level of misconduct where the evidence establishes that the circumstances surrounding the absence or lateness were within the claimant's control. For example, the Board has held the claimant has engaged in misconduct where the lateness or absence is due to inadequate measures to ensure that he or she woke up

[10] *See* Appeal Board No. 585656 (citing Appeal Board Nos. 582469, 551412, 548690 and 545989); *see also,* Appeal Board No. 582469 (no misconduct where employer allowed claimant to be late 26 times after final warning was issued because the claimant could not have known the last tardiness would place her job in jeopardy).

[11] *See* Appeal Board Nos. 576585; 563893; 545989.

[12] *See* Appeal Board No. 582603 (citing Appeal Board Nos. 542604 and 568234); *see also,* Appeal Board No. 575706 (warning for tardiness was insufficient to place claimant on notice that his job was in jeopardy for incident of being a "no call no show"); Appeal Board No. 585378 (prior warnings for tardiness were insufficient to place claimant on notice that absence would result in discharge as Board has held "not…all forms of time and attendance violations [are] interchangeable") (citing Appeal Board No. 584858).

[13] *See* Appeal Board No. 584265 (no misconduct where the claimant's prior warning only advised her of the consequences for failing to notify employer of a lateness, not the consequences of the lateness itself).

[14] *See* Appeal Board No. 582603 (citing 581324, 564793, 569082A); *see also,* Appeal Board Nos. 575706, 564793 and 565297.

on time for work,[15] failing to make reasonable efforts to find transportation to work,[16] or failing to properly record work schedule.[17]

EXCUSED ABSENCES

A claimant's absence or lateness due to a circumstance beyond his or her control is not considered misconduct.[18] Where the credible evidence establishes that the claimant's last absence was due to illness, the claimant's absence is excused and there is no misconduct.[19] Additionally, other unforeseen circumstances have been held to be compelling reasons excusing an absence or lateness. For example, the Board has declined to find misconduct where a claimant is absent due to unexpectedly losing transportation or having car trouble,[20] inability to find child

[15] Appeal Board No. 543191; Appeal Board No. 590492 (claimant's actions rose to level of misconduct where she was an hour late to work due to having overslept after having received two prior warnings for tardiness, despite her contention that she was recovering from a bout of pneumonia); Appeal Board No. 550788 (claimant's tardiness after warning was misconduct despite her contention that she overslept due to side effects of medication where claimant had been taking medication for three years, should have been aware of its side effects and should have taken additional steps to address side effects so she could arrive at work on time); *but see,* Appeal Board No. 584261 (claimant not disqualified where evidence established that claimant slept through his alarm due to being tired from a double shift and experiencing side effect of medication).

[16] Appeal Board No. 540282 (claimant's absence after warning due to co-worker's failure to pick her up for work found to be misconduct where claimant could have taken the bus to get to work).

[17] Appeal Board No. 565389 (claimant received final warning stating any future no shows will result in termination and was absent without calling 5 days later because she had recorded the start time of her shift incorrectly on her personal notepad); Appeal Board No. 590518 (claimant discharged for misconduct where after receiving notice that his job was in jeopardy for attendance, he was absent from work due to misreading the schedule).

[18] *See Matter of Massucci,* 8 A.D.3d 737 (3d Dep't 2004).

[19] Appeal Board No. 567176 (claimant's absence did not constitute misconduct where evidence established that claimant was unable to report to work due to sickness); Appeal Board No. 576671A (claimant did not engage in misconduct where his tardiness and failure to call in within the appropriate time limit was due to illness, a circumstance beyond his control).

[20] Appeal Board No. 549446 (claimant, who was on a final warning for absenteeism, did not engage in misconduct where on his way to work, his transmission exploded which resulted in him being 4 hours late for work as it was a circumstance beyond his control); Appeal Board No. 552827 (claimant's lateness after warning due to flat tire did not rise to the level of misconduct); Appeal Board No. 590372 (claimant's tardiness was beyond his control where his automobile became inoperable on his way to work).

care,[21] domestic violence,[22] caring for a sick child,[23] or because of unexpected traffic or transit delays.[24]

NO CALL / NO SHOW

In circumstances where the claimant is absent from work and does not contact the employer, it must be determined whether the claimant had a compelling reason for failing to contact the employer regarding the absence.[25] It has been held that a claimant does not have a compelling reason for failing to contact an employer where the claimant alleges he or she did not have the employer's number or where his or her phone was inoperable when the claimant does not make efforts to use another telephone or to find the employer's number elsewhere.[26] However, in circumstances where illness or other compelling reason prevents the claimant from contacting the employer, a failure to report an absence will not be considered misconduct.[27]

2.2.3 ALCOHOL / DRUG USE

Whether a claimant who is discharged for reasons related to drug or alcohol use has lost employment through misconduct for unemployment insurance purposes will depend upon the conduct in which the employee engaged, the type of position the employee held, whether the conduct was in the workplace or off-duty and whether the employer has a sufficiently specific policy prohibiting such conduct.

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[21] *See, e.g.,* Appeal Board No. 560141 (claimant's lateness due to sudden lack of child care was a circumstance beyond her control).

[22] *See, e.g.,* Appeal Board No. 569726.

[23] *See, e.g.,* Appeal Board No. 553187.

[24] *See* Appeal Board No. 554093; Appeal Board No. 589986 (claimant's tardiness was beyond her control where she encountered 47 minutes of transit delays and had left home 2 hours prior to her scheduled shift); *but see,* Appeal Board No. 556574 (claimant's tardiness was too regular and continuous to be excused by heavy traffic)

[25] *See* Appeal Board No. 583550 (claimant's illness may have given him good cause to be absent but did not relieve him of the responsibility of notifying the employer of his absence); Appeal Board No. 544882 ("The fact that she may have had good cause to be absent does not excuse her from the requirement that she comply with the employer's notification policies").

[26] *See* Appeal Board No. 575001 (claimant's failure to report absence to employer was misconduct where her cell phone was inoperable and she did not make effort to use telephone elsewhere); Appeal Board No. 574982 (claimant's failure to report absence to employer was misconduct where he did not have access to his own cell phone but had access to his girlfriend's cell phone and made no effort to find the employer's telephone number).

[27] *See, e.g.,* Appeal Board No. 587616 (claimant's failure to call out was a result of her illness and therefore did not rise to the level of misconduct).

THE EMPLOYER'S POLICY

In order to hold that there was a loss of employment through misconduct, the employer's policy must be sufficiently specific and clearly put the claimant on notice of what would be considered prohibited conduct. Where an employer's policy does not explicitly state that drug or alcohol use on or off the job is prohibited, the Board had held that they will not interpret it to include those additional factors in order to disqualify a claimant from benefits.[28]

Where a policy does not explicitly state that a positive drug or alcohol test result constitutes a violation of the employer's policy, a positive drug or alcohol test, alone, does not necessitate a finding of misconduct.[29] The Board has also held that a policy using the words "impaired" or "under the influence" is insufficient to warn an employee of the consequences of reporting to work after the use of alcohol and/or drugs.[30]

A claimant's refusal to submit to a random drug test or a reasonable suspicion drug test in violation of the employer's specific policy would constitute misconduct, absent a compelling reason for the refusal.[31]

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[28] *See* Appeal Board No. 564098; Appeal Board No. 563336; Appeal Board No. 549173 (citing *Matter of Spierto,* 78 A.D.3d 1365 (3d Dep't 2010)); Appeal Board No. 591761 (citing Appeal Board Nos. 564098, 56336 and 549173); *but see,* Appeal Board No. 567793 (positive test for certain illegal drugs, e.g. cocaine, constitutes misconduct even in the absence of a formal policy, as "cocaine use represents a willful disregard of the standards of conduct an employer has right to expect.") (citing *Matter of Cumberland*, 249 A.D.2d 867 (3d Dep't 1998); *Matter of Bruno*, 236 A.D.2d 730 (3d Dep't 1997); *Matter of Gilbert*, 232 A.D.2d 709 (1996)).

[29] *See* Appeal Board No. 582233 ("The Board has consistently held that, absent notice to a claimant that his or her failing a drug test, for the first time, would result in discharge, a claimant's failing a drug test, for the first time, does not constitute misconduct for Unemployment Insurance purposes."); Appeal Board No. 549173 (citing Appeal Board Nos. 504604, 475641, 441129); *see also,* Appeal Board Nos. 565881, 549173, and 581990.

[30] *See* Appeal Board No. 590561 (employer's policy stating "no employee shall report to work under the influence of alcohol" was insufficient to put claimant on notice that consuming three to four drinks approximately four hours prior to his shift would place his job in jeopardy) (citing Appeal Board Nos. 589790 and 584902); Appeal Board No. 563336 (employer's policy stating that an employee who comes to work under the influence of drugs or alcohol would be subject to disciplinary action was insufficient for a finding of misconduct where the claimant tested positive for marijuana as the record did not establish that the claimant used marijuana in the workplace or that his judgment or cognition were impaired while working); *see also,* Appeal Board Nos. 581990 and 549173.

[31] *Matter of Grover*, 233 A.D.2d 809 (3d Dep't 1996); Matter of Gordon, 278 A.D.2d 579 (3d Dep't 2000); *Matter of Ramsey*,17 A.D.3d 949 (3d Dep't 2005); Appeal Board No. 544880 (claimant engaged in misconduct where he refused to submit to a drug and alcohol test in violation of the employer's policy stating "an employee who does not submit to testing when suspected of being under the influence of drugs or alcohol will be relieved of his duty, and is subject to discharge"); *see also,* Appeal Board Nos. 584911, 568513, 548061 and 553573.

WORKPLACE CONDUCT

Certain actions may be excused and therefore not found to be misconduct if the evidence shows that (1) the claimant is an alcoholic; (2) the alcoholism caused the behavior leading to discharge; and (3) the claimant was available for and capable of work.[32] If "sufficiently specific," a claimant's testimony can establish alcoholism without the need for supporting documentation.[33]

Alcoholism has been found by the Board to excuse a claimant's absence without notice[34] or bringing alcohol to the workplace.[35] While the Board has previously held reporting to work under the influence of alcohol constitutes misconduct if the employer's policy specifically prohibits an employee from having alcohol in his or her system during working hours,[36] more recent cases have excused an alcoholic claimant's actions of reporting to work after having consumed alcohol or reporting to work under the influence of alcohol.[37]

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[32] *Matter of Pluckhan,* 256 A.D.2d 1024 (3d Dep't 1998) (citing *Matter of Francis*, 56 N.Y.2d 600 (1982)); *Matter of Snell*, 195 A.D.2d 746, 747 (3d Dep't 1993)). Note that alcoholism does not per se render a claimant unable to work, even if the claimant is receiving treatment. Whether a claimant is not available or capable of work due to alcoholism is discussed more fully in the Availability/Capability chapter.

[33] Appeal Board No. 569884A (citing *Matter of Francis*, 56 N.Y.2d 600 (1982) ("The Court has long held that given sufficiently specific testimony from the claimant, medical documentation is not required to establish the existence of alcoholism")).

[34] Appeal Board No. 569884A (In finding the claimant did not engage in misconduct, the Board had to determine "whether the claimant's failure to call or report to work for these days arose from a conscious choice for which he can be held liable for misconduct, notwithstanding a possible diagnosis of alcoholism (See *Matter of Gaiser*, 82 A.D.2d 629 (3d Dep't 1981)) or whether his failure to call or report to work arose from his illness of alcoholism and can be excused (*See Matter of Snell*, 195 A.D.2d 746 (3d Dep't 1993))"; *see also,* Appeal Board No. 577145.

[35] Appeal Board No. 575493 (claimant found not to have engaged in misconduct for bring alcohol to the job where evidence established he was a chronic alcoholic who was unable to control his alcohol addiction).

[36] *See* Appeal Board No. 585861 (claimant found to have engaged in misconduct where employer had a zero-tolerance policy and claimant was subject to DOT regulations, claimant was aware of the policy and he tested positive for alcohol. Under these circumstances, no prior warning was necessary) (citing Appeal Board No. 558387 and 585996); Appeal Board No. 585996 (claimant found to have engaged in misconduct where employer had a zero-tolerance policy for drug or alcohol use and claimant tested positive for alcohol 6 hours after the beginning of his shift); Appeal Board No. 552082 (claimant found to have engaged in misconduct where employer had an alcohol/drug free environment policy, claimant admitted to drinking a beer prior to work and tested positive for alcohol); Appeal Board No. 567354 ("[T]he law is well-settled that reporting to work under the influence of alcohol is misconduct, regardless of whether a claimant is an alcoholic"); Appeal Board 547995 ("The Board has long held that an alcoholic is responsible for her conscious actions, including reporting to work while under the influence").

[37] *See* Appeal Board No. 597315 (The "final incident of drinking to the point of intoxication and reporting to work while intoxicated stemmed from [the claimant's] alcoholism. Because the claimant's disease caused his actions, [his] actions do not constitute misconduct for purposes of the Unemployment Insurance Law.") (citing *Matter of Snell*, 195 A.D.2d 746 (3d Dep't 1993)); Appeal Board No. 591039 ("We find this evidence sufficient to conclude that the claimant suffers from alcoholism, which is a disease, and that the behavior of drinking during working hours…was a slip or relapse as a result of his disease and not within his control."); *see also,* Appeal Board No. 550666 ("the claimant's conduct in

However, where a claimant holds a safety-sensitive position, conduct related to the disease of alcoholism cannot be excused.[38] Further, alcoholism does not excuse all forms of misconduct.[39] For example, an alcoholic claimant has been found to have committed misconduct where he or she engages in theft from an employer,[40] engages in conduct caused by a combination of alcohol and illegal drugs,[41] drives while intoxicated,[42] falsifies time records,[43] and/or threatens others.[44]

The use of illegal drugs at the workplace or reporting under the influence constitutes misconduct so long as the employer's policy specifically prohibits such conduct.[45] Unlike alcoholism, addiction does not serve as a defense.[46] Even accepting that drug addiction is a disease, the Board has

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drinking an undetermined quantity of alcohol before work and reporting to his shift under the influence [BAC .089%] should be considered attributable to or a symptom of his alcoholism… The claimant's discharge was the result of his illness of alcoholism, rather than his own misconduct").

[38] *See* Appeal Board No. 562576 ("The fact that the claimant's position was safety-sensitive and that he worked as a conductor in a public transit system removes this situation from the category of cases in which behavior may be found non-disqualifying because a claimant is an alcoholic."); Appeal Board No. 585996 ("The Court has further held that the fact that a claimant may be an alcoholic does not excuse his actions when he is in a safety sensitive position…")

[39] Appeal Board No. 542715 ("not all behavior is excused by alcoholism").

[40] Appeal Board No. 551728 (alcoholic claimant found to have engaged in misconduct when he stole mini bottles of liquor from the airline employer during the performance of his duties).

[41] *See* Appeal Board No. 572084 ("While alcoholism may excuse episodes of absenteeism, the Board has repeatedly held that an absence due to criminal activity does not offer any excuse to a charge of misconduct.") (citing Appeal Board No. 542565).

[42] Appeal Board No. 541930 ("we have held that an alcoholic claimant who is discharged as a result of driving while intoxicated is not immune from disqualification on the basis of misconduct. Though the claimant's drinking may have been beyond his control, his decision to get into his car and drive in an inebriated state is not excused, even when that decision was made under the influence of alcohol") (citing Appeal Board No. 535741); *see also,* Appeal Board Nos. 585293 and 590376.

[43] Appeal Board No. 569343 ("not all acts may be excused by alcoholism and the fact that the claimant is an alcoholic does not mean that she is incapable of misconduct (*Matter of Gaiser*, 162 A.D.2d 753 (3d Dep't 1982)). Falsification of time records constitutes misconduct for unemployment insurances purposes in that it is detrimental to the employer's interest") (citing Appeal Board No. 549399).

[44] Appeal Board No. 552066 (postal service employee found to have engaged in misconduct where he was arrested for sending threatening letter while drunk to a person involved with his former girlfriend in violation of the employer's policy requiring employees to conduct themselves in a manner reflecting favorably on the postal service both during and outside of working hours).

[45] Appeal Board No. 539923 (claimant found to have engaged in misconduct where he admitted to employer he had smoked marijuana on the employer's premises).

[46] Appeal Board No. 562728 ("Although a relapse of alcoholism may be excused for purposes of the Unemployment Insurance Law under the theory that alcoholism is a disease such that relapse is beyond the sufferer's control, we do not apply this theory to relapses of illegal drug abuse. Even accepting that drug addiction is a disease, the claimant's initial choice to use illegal drugs was a voluntary choice to break the law. The claimant's addiction therefore is a

held that a claimant's initial choice to use illegal drugs is a voluntary choice to break the law. A claimant's addiction, therefore, is a consequence of this unlawful choice, and cannot be excused as being beyond the claimant's control.[47]

DRUG / ALCOHOL TESTING

Establishing whether an individual is under the influence of drugs or alcohol is often done via a chemical test.

BREATH SAMPLE

In cases where the claimant provides a breath sample using an instrument such as a Breathalyzer and does not dispute the result, those results can properly be admitted and relied upon. However, where the claimant disputes the result of a breath test, the evidence must establish that the instrument was in proper working condition. This can be accomplished through the testimony of the technician who administered the test, who should provide evidence that the instrument was properly calibrated and in proper working order. [48]

BLOOD, URINE, AND HAIR SAMPLES

In cases where the claimant disputes the results of a blood, urine, or hair sample that has been sent to a laboratory for testing, the evidence must establish chain of custody throughout the collection and testing process.[49] It must also be established that the laboratory and testing personnel were qualified, that the test(s) performed were reliable, and that the sample was properly collected and received by the laboratory.[50] Assuming the witness is competent to testify

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consequence of this unlawful choice and cannot be excused as being beyond the claimant's control."); Appeal Board No. 548350 (in the context of attendance problems, detoxification and rehabilitation from substances other than alcohol have not provided employees with good cause for their absences from work because they stem from volitional acts within the claimant's control).

[47] Appeal Board No. 562728.

[48] Appeal Board No. 585861 ("While the claimant essentially disputed the results, the first-hand testimony of the technician who administered the test supports the validity of the test results."); Appeal Board No. 542989 ("while the printer on the machine may have malfunctioned, the machine had been recently calibrated and tested for accuracy and was functioning correctly").

[49] Appeal Board No. 585036 ("before the test results may be accepted as definitive evidence that there was alcohol in the claimant's system, there must be evidence of a complete chain of custody establishing that the integrity of the sample was maintained throughout the collection and testing procedure") (citing *Matter of Atkinson*, 185 A.D.2d 415 (3d Dep't 1992)).

[50] *Matter of Atkinson*, 185 A.D.2d 415 (3d Dep't 1992).

regarding the results/lab procedures, the individual who actually conducted the test is not required to appear.[51]

DEVELOPING THE RECORD ON CHAIN OF CUSTODY

When a claimant denies use of the drug to which he tested positive, the evidence must establish a complete chain of custody relating to the sample. [52] In other words, the integrity of the sample throughout the collection and testing procedure must be established before the test can be relied upon. This typically consists of three stages:

1. Collection of the sample:

This is the process of taking and securing the sample (urine, blood, etc.) for delivery to the testing site. A claimant's signature on a chain of custody form can establish that the collection procedure was handled properly.[53] In the absence of such a signature, an employer witness with direct knowledge should be questioned about how the sample was obtained from the claimant, sealed and packaged to ensure no tampering, and delivered to the testing site.

2. Shipment of the sample

So long as the evidence establishes that the sample was received at the testing site intact, no testimony is needed from the shipper or courier.[54]

3. Testing of the sample

Once received intact, the evidence must establish that the testing facility was authorized/accredited to perform the testing, that the testing was performed in accordance with the laboratory's procedures, and that the results of the tests were reliable. The laboratory's

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[51] Appeal Board No. 571780 ("Since the medical doctor credibly testified at the hearing, the chemists who actually performed the tests are not necessary to establish the integrity of the sample and the tests performed on it").

[52] Appeal Board No. 576279 ("The claimant contends that he has not smoked marijuana in some 6 years and that the test result was due to second hand exposure. Given the claimant's contention, the evidence must establish a complete chain of custody to ensure the integrity of the sample throughout the collection and testing procedure in order for the test result to prevail over the claimant's denial of marijuana use"); Appeal Board No. 554006.

[53] Appeal Board No. 575812 ("the claimant's signature on the chain of custody form may be sufficient to establish that the collection procedure was handled properly" but the employer also must present evidence that the claimant's sample was received intact at the testing laboratory and that the sample provided by the claimant was the one that was actually tested).

[54] Appeal Board No. 554006 ("no testimony is needed from the shipper, provided that there is testimony that the sample was received intact at the testing site"); Appeal Board No. 585022 ("when the sample arrives at the testing laboratory with the seal intact, as in this case, the testimony of the courier is unnecessary").

internal chain of custody form is sufficient to meet these requirements.[55] This form can be authenticated by the laboratory director, a Medical Review Officer who reviewed/certified the test results, or another employee of the laboratory with sufficient knowledge of its procedures.[56] Testimony from the individuals who physically handled the sample, e.g. the chemists or lab technicians, is not required.[57]

2.2.4 ALTERCATIONS

PHYSICAL ALTERCATIONS

It is well-settled that fighting with or assaulting a coworker, regardless of who initiates the confrontation, may constitute disqualifying misconduct.[58]

Whether a physical altercation with a coworker constitutes misconduct "will depend on whether the claimant responded only to the extent needed to defend himself; and whether he had the opportunity or ability to retreat."[59] A prior warning may not be necessary for a finding of misconduct.[60]

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[55] Appeal Board No. 546552 (citing *Matter of Atkinson*, 185 A.D.2d 415 (3d Dep't 1992) ("a chain of custody form may be sufficient to establish a foundation for the admissibility of drug test results in administrative proceedings")).

[56] *Id.*; *see also,* Appeal Board Nos. 542881; 576279; 546552; *but see,* Appeal Board No. 585022 (testimony of an independent Medical Review Officer who is not connected to the testing laboratory but knows of its reputation is insufficient to establish chain of custody).

[57] Appeal Board No. 546552.

[58] *Matter of Chisholm,* 54 A.D.3d 1094 (3d Dep't 2008) (citing *Matter of Bruner,* 22 A.D.3d 946 (3d Dep't 2005)); *Matter of McGloin,* 9 A.D.3d 727 (3d Dep't 2004); *Matter of Jones,* 100 A.D.3d 1134 (3d Dep't 2012).

[59] Appeal Board No. 591237 (citing Appeal Board No. 550148); *Matter of Ferrarie* 176 A.D.2d 420 (3d Dep't 1991) (claimant's action in shoving co-worker was misconduct as evidence established it was not a spontaneous reaction to co-worker, claimant had opportunity and obligation to break off confrontation and failed to do so); Appeal Board No. 572014 (claimant's actions in placing her hands on a co-worker's neck and throat was misconduct where it was not self-defense and instead of retreating from the situation when she had the opportunity to do so, she escalated the situation by verbally antagonizing him).

[60] Appeal Board No. 591237 (single act of workplace violence constituted misconduct where claimant hit his female co-worker twice and knocked her to the floor after she pulled out some of his hair); *but see* Appeal Board No. 551256 (claimant had been employed for more than 11 years, had no prior warning, and claimant's reaction of pushing away co-worker was spontaneous reaction to being pushed by co-worker, under these circumstances the claimant's reaction does not constitute misconduct).

THREATS

Threats to inflict bodily harm on a co-worker, supervisor or employer is detrimental to the employer's interests in maintaining a tranquil workplace and an employer need not wait until a direct threat against an employee's safety is carried out before taking action.[61] Threats rise to the level of misconduct if the evidence establishes the claimant's speech could be reasonably construed as an intent to inflict harm.[62] The fact that the claimant may not have received a prior warning does not necessarily preclude a finding of misconduct.[63] If, however, the language used does not indicate actual intent to harm,[64] is too general in nature to be viewed as a threat,[65] or can be viewed as a comment expressing general disdain and dissatisfaction with the employer and coworkers,[66] no misconduct will be found.

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[61] Appeal Board No. 590848 (citing Appeal Board No. 560139).

[62] *Matter of Colindres,* 91 A.D.3d 991 (3d Dep't 2012) (claimant found to have engaged in misconduct where he threatened a supervisor with physical harm during an altercation) (citing *Matter of Gigi,* 37 A.D.3d 894 (3d Dep't 2007)); *Matter of Terry,* 23 A.D.3d 727 (3d Dep't 2005)); Appeal Board No. 594818 (claimant's threat to slash supervisor's tires and "throat punch" store manager rose to level of misconduct as the menacing and specific nature of the threats removed them from the category of mere "venting" and into the class of behavior that was so deliberate and intimidating as to constitute misconduct); Appeal Board No. 560139 (claimant's statement to coworker during an argument that he would cut his throat from ear to ear rose to the level of misconduct); Appeal Board No. 579702 (claimant's text message to supervisor stating that he had purchased a gun and would harm supervisor rose to the level of misconduct); Appeal Board 586114 (Claimant made a statement to co-workers that there were no cameras in the bathrooms and they should not go alone in response to coworkers moving his belongings. In finding the statement to be a threat rising to the level of misconduct the Board noted the statement was made to specific people, violated the employer's policy of which the claimant was aware).

[63] Appeal Board No. 551640 ("It is immaterial that the claimant did not receive a prior warning as threatening to kill one's employer is an action that requires no prior warning to constitute disqualifying misconduct") (citing Appeal Board No. 508409 and Appeal Board No. 464536).

[64] Appeal Board No. 545468 (Board found isolated instance of poor judgment regarding claimant's statement to supervisor that he "should smash [him] in the teeth" in response to a threatening remark by supervisor as it was idle threat and not one of imminent harm); Appeal Board No. 591952 (no misconduct where claimant's statement to manager that all employees wanted a different manager dead and that one day he would be dead did not constitute threat of immediate harm); Appeal Board No. 591433 (statement that claimant stated he "wanted to slap her" use of the word "want" indicates an unrealized wish instead of an actual threat of imminent harm and no action accompanied the words).

[65] Appeal Board No. 574926 (claimant's remarks were too general to be viewed as a threat but were more an expression of her anger and frustration) (citing Appeal Board Nos. 565536 and 543872).

[66] Appeal Board No. 546271 (claimant's comment to a co-worker that he was going to "start slapping the s*** out of some mo********ers here" found to be merely an expression of dissatisfaction between co-workers); Appeal Board No. 543872 (Board found claimant's comment that if co-worker "did not stop making f-ing comments, [he] would knock her f-ing teeth out" was isolated instance of poor judgment where there was no evidence of intent to follow through on comment and no evidence claimant had ever had a history of that type of behavior).

VERBAL ALTERCATIONS

In determining whether verbal altercations in the workplace rise to the level of misconduct for unemployment insurance purposes, the Board and Court consider whether the claimant has received any prior warnings,[67] whether the employer has a policy prohibiting the conduct,[68] whether the claimant used profanity, and whether the conduct occurred in front of or with customers.[69] Even if the claimant received a prior warning for a verbal altercation, the ALJ must consider the circumstances of the final event to determine if it constitutes misconduct.[70] Also, see further discussion in the section on Insubordination.

2.2.5 CRIMINAL CONDUCT

A claimant who is discharged for engaging in criminal conduct has lost employment due to misconduct so long as the evidence establishes that the claimant engaged in the conduct as alleged and there is a sufficient nexus between the claimant's job and the criminal conduct.[71]

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[67] Appeal Board No. 563952 (claimant's engagement in a verbal altercation with a co-worker found to be an isolated instance of poor judgment where evidence established that she was not involved in any prior, similar incidents during her 13 years of employment); Appeal Board No. 578880 (claimant did not engage in misconduct when after an intense work day she lost her temper, loudly complained to the receptionist with profanity about the schedule and spoke angrily with profanity to remark of the dentist as she had never been warned for this type of behavior before and there were no patients in the office at the time); *but see,* Appeal Board No. 589808 (claimant found to have engaged in misconduct by engaging in verbal altercation with coworker where he had been previously warned and suspended for using derogatory language towards a co-worker).

[68] Appeal Board No. 549815 (claimant did not violate the employer's policy forbidding employees from using abusive, profane or offensive languages or gestures where she raised her voice at a co-worker who was yelling at her and called the co-worker childish); Appeal Board No. 578426 (claimant knew or should have known his conduct would jeopardize his employment where he was aware of the employer's policy stating that threatening a coworker and using abusive language to a coworker could subject an employee to disciplinary proceedings).

[69] Appeal Board No. 555495 (claimant found to have engaged in misconduct when she directed an obscenity laced tirade at a customer in violation of the employer's policy); Appeal Board No. 570263 (claimant's action in giving a Nazi salute, saying "Heil Hitler," and engaging in verbal altercation with a customer who complained of his actions, violated the employer's policy requiring an employee to provide a friendly atmosphere to employees and customers and constituted misconduct); *but see,* Appeal Board No. 554984 (claimant found not to have engaged in misconduct where employer did not intervene when irate customer was berating claimant, claimant told customer to shut up and directed a profanity at her while dismissing her from the store).

[70] Appeal Board No. 550827 (Although claimant had received a prior warning for a verbal altercation with a coworker, Board found no misconduct where the claimant's verbal altercation with a coworker was in response to her co-worker's refusal to provide assistance to a patient as the claimant asked).

[71] Appeal Board No. 546971.

EVIDENCE OF CRIMINAL ACTIVITY

New York State Penal Law § 10.00 defines a crime as a felony or a misdemeanor.[72] Violations, such as convictions for disorderly conduct, are not crimes and do not result in an automatic finding of misconduct.[73]

A criminal charge or an arrest, without evidence that the claimant actually engaged in the conduct as alleged, is insufficient to support a finding of misconduct for unemployment insurance purposes.[74] However, even in the absence of the disposition of charges or where criminal charges are reduced to a violation or dismissed, the claimant's admission to the conduct or credible evidence regarding the illegal activity may establish that it actually occurred, supporting a finding of misconduct. [75]

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[72] Penal Law §10.00 Definitions of terms of general use in this chapter. Except where different meanings are expressly specified in subsequent provisions of this chapter, the following terms have the following meanings: (1) "Offense" means conduct for which a sentence to ta term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state, or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same. (2) "Traffic infraction" means any offense defined as "traffic infraction" by section one hundred fifty-five of the vehicle and traffic law. (3) "Violation" means an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed. (4) "Misdemeanor" means an offense, other than a traffic infraction, for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed. (5) "Felony" means an offense for which a sentence to a term of imprisonment in excess of one year may be imposed. (6) "Crime means a misdemeanor or a felony.

[73] Appeal Board No. 583742 (the board will no longer follow the ruling in Appeal Board No. 546818 that a conviction of disorderly conduct results in an automatic finding of misconduct); Appeal Board No. 562647 (claimant plea to a violation is not criminal conviction and does not constitute an act of wrongdoing).

[74] *Matter of Weigand,* 259 A.D.2d 824 (3d Dep't 1999) (a finding of misconduct should not be predicated upon an arrest); Appeal Board No. 541065; Appeal Board No. 583073 (no misconduct where there is no evidence that the claimant engaged in the criminal conduct that led to his arrest and incarceration, claimant had limited access to phone and acted with reasonable diligence to have family member and co-worker call employer for the claimant; note also that the Appeal Board rejected employer's contention that claimant should have remained a fugitive for the employer's benefit).

[75] *Matter of Washington,* 304 A.D. 2d 896 (3d Dep't 2003) (Although claimant asserts she was falsely accused, Appeal Board was free to credit testimony that the claimant engaged in the illegal activity notwithstanding the fact that the criminal charges were dismissed); Appeal Board No. 581195 (Board not persuaded by claimant's denial of misappropriating 80 cases of the employer's beer, and notwithstanding claimant's guilty plea to disorderly conduct, a violation, Board found that claimant's actions constitute misconduct); Appeal Board No. 561603 (claimant acknowledged the underlying petit larceny and possession of stolen property that led to the criminal charge but pled guilty to disorderly conduct, which is a violation and not a crime. Since the claimant acknowledged the underlying illegal activity and such activity called into question the claimant's integrity and character given the claimant's job responsibilities providing unsupervised in-home care for intellectually challenged individuals, claimant's conduct constitutes misconduct).

Additionally, even if a claimant denies engaging in the conduct as alleged, when he or she pleads guilty to a criminal charge, it is an admission of responsibility for a criminal act, no matter what the claimant's motives for such a plea may have been.[76] A conviction of a felony or misdemeanor charge is also an acknowledgement of the claimant's guilt, regardless of whether the claimant denies engaging in the conduct as alleged. [77] Similarly, where a claimant has entered an "Alford" or "Serrano" plea[78] in a criminal matter, such plea may be relied upon as if it were a conviction of the criminal conduct.[79]

In situations where a claimant pleads guilty or is convicted of a criminal charge and receives a conditional discharge, the underlying plea or conviction is evidence of the claimant's wrongdoing. A conditional discharge is a type of sentence imposed on a criminal defendant when the court is of the opinion that a sentence of imprisonment would serve neither the public interest nor the ends of justice.[80] It is not evidence of the claimant's innocence and does not mean the charges were dismissed. [81] Further, the claimant's possession of a Certificate of Relief from Civil

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[76] Appeal Board No. 578040 ("We have repeatedly held that a defendant's voluntary acceptance of a 'guilty' plea to criminal charges establishes the underlying elements of the plea as findings of fact for unemployment insurance purposes") (citing Appeal Board Nos. 395954, 546614A and 548329); Appeal Board No. 548329 (citing Appeal Board No. 546614A).

[77] Appeal Board No. 522066 ("The claimant's conviction establishes as a matter of law that he was responsible for the act") (citing Appeal Board Nos. 548329 and 546614A); Appeal Board No. 548688A (claimant/police officer conviction of several felonies sufficient to sustain misconduct determination); Appeal Board No. 580930 (claimant/correction officer conviction of misdemeanor for falsifying business records, as established by certificate of disposition, is accepted notwithstanding claimant's denial of guilt).

[78] An "Alford" or "Serrano" plea is a voluntary guilty plea made without admitting culpability where there is strong evidence of actual guilt.

[79] Appeal Board No. 504978 ("We reject the contention, advanced by the claimant's representative, that the claimant's Serrano (Alford) plea does not constitute an admission of guilt to the particular offense, thereby precluding a finding of misconduct. The New York State Court of Appeals has held that the 'acceptance of a plea, without an admission of culpability, was not an indication that the State viewed him as innocent.' *Silmon v Travis*, 95 N.Y.2d 470, 475 (2000). Rather, the benefit of this particular plea was simply that the claimant was not required to admit to the facts underlying the conviction at the time of the plea. The Serrano (Alford) plea treated by the State as if it were a conviction and the plea may be utilized 'as the predicate for civil and criminal penalties.' *Id*.").

[80] NYS Penal Law §65.05 "(1)(a) The court may impose a sentence of conditional discharge for an offense if the court, having regard to the nature and circumstances of the offense and to the history, character and condition of the defendant, is of the opinion that neither the public interest nor the ends of justice would be served by a sentence of imprisonment and that probation supervision is not appropriate." "(2) The court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of conditional discharge."

[81] Appeal Board No. 546818 (while this case is no longer followed for the proposition that a plea to a violation is evidence of criminal conduct, it correctly states "We do not agree with the Judge that the conditional discharge absolves the claimant: a conditional discharge is a sentence imposed on a criminal defendant when the court is of the opinion that a sentence of imprisonment would serve neither the public interest nor the ends of justice [Penal Law § 65.05]. It is not a dismissal of the charges; and does not mean that the claimant was innocent"); *see also,* Appeal Board No. 546614

Disabilities[82] does not insulate the claimant from a finding that he was discharged due to misconduct based on underlying criminal actions.[83]

However, an adjournment in contemplation of dismissal (ACOD) is neither a conviction nor an acknowledgment of guilt.[84] Accordingly, it is not evidence that the claimant actually engaged in the underlying criminal conduct.[85] Likewise, restitution is a condition that can be imposed as part of a sentence, but an agreement to make restitution is insufficient by itself to overcome the claimant's denial of any criminal conduct.[86] It may however, be used as evidence that the claimant knew that the underlying actions were detrimental to the employer's interest.[87]

(finding that the claimant engaged in the criminal conduct alleged as she pled guilty to a petit larceny charge pursuant to Section 155.25 of the Penal Law despite only receiving a fine and a conditional discharge); Appeal Board No. 542524 (finding the claimant engaged in the criminal conduct as alleged as he pled guilty to a Class B Misdemeanor and received a conditional discharge).

[82] NYS Corr. L. §701(3): "A certificate of relief from disabilities shall not, however, in any way prevent any judicial, administrative, licensing or other body, board or authority from relying upon the conviction specified therein as the basis for the exercise of its discretionary power to suspend, revoke, refuse to issue or refuse to renew any license, permit or other authority or privilege."

[83] *Matter of Belmar*, 122 A.D.2d 478 (3d Dep't 1986) (holding that a certificate of relief from disabilities did not insulate claimant from finding that his guilty plea to felony constituted misconduct for unemployment insurance purposes); Appeal Board No. 587755 ("it has been held that obtaining a Certificate of Relief from Disabilities pursuant to Correction Law § 701(3) does not insulate an individual from a finding of ineligibility to receive unemployment insurance benefits due to misconduct") (citing *Matter of Bruggerman*, 101 A.D.2d 973 (3d Dep't 1984)); *Matter of Springer*, 68 A.D.2d 1011 (3d Dep't 1979)).

[84] NYS Criminal Procedure Law §170.55 (8): "The granting of an adjournment in contemplation of dismissal shall not be deemed to be a conviction or an admission of guilt. No person shall suffer any disability or forfeiture as a result of such an order. Upon the dismissal of the accusatory instrument pursuant to this section, the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution."

[85] Appeal Board No. 550533 ("The charge against the claimant was ultimately resolved through an adjournment in contemplation of dismissal, which is neither a conviction nor an admission of guilt and is not evidence of misconduct"); Appeal Board No. 581290 (No misconduct where claimant was discharged for being a no call / no show for three days after being instructed by detective in ongoing criminal investigation against her not to contact employer and where there was no evidence that the claimant engaged in the underlying conduct as criminal charges were ultimately adjourned in contemplation of dismissal).

[86] Appeal Board No. 542261 (no finding of misconduct where claimant pled guilty to a violation; agreement to make restitution was not sufficient to overcome the claimant's denial of the criminal conduct).

[87] Appeal Board No. 554349 (in finding that the claimant engaged in misconduct, the Board held that the claimant's agreement to pay restitution to nursing home resident with dementia from whom he had been given money was further indication that claimant acknowledged what he did was wrong).

OFF-THE-JOB BEHAVIOR

It is well-settled that if there is a sufficient connection between the claimant's employment and criminal conduct, the claimant has lost employment under disqualifying conditions.

The Board and Court have held that "an employee also has an obligation, even during his off-duty hours, to honor the standards of behavior which his employer has a right to expect of him and that he may be denied unemployment benefits as a result of misconduct in connection with his work if he fails to live up to this obligation."[88] The focus, for a finding of misconduct related to off-duty activity, is on whether the conduct raises serious questions regarding the claimant's integrity in relation to the claimant's job responsibilities.[89]

The Board has noted that criminal activity is 'in connection with' employment if the activity results in breach of a duty, express or implied, the claimant owes the employer. [90] It has also noted that the nature of the employment determines the scope of the duty owed to the employer.[91]

For example, the Board has found a sufficient connection between the off-duty criminal conduct and a claimant's job responsibilities in the private sector in circumstances where a security guard pled guilty to criminal charges of theft,[92] a nurse pled guilty to criminal charges of theft,[93] a supervisor at a bank pled guilty to charges of theft,[94] a worker at a group home pled guilty to

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[88] *Matter of Markowitz*, 94 A.D.2d 155 (3d Dep't 1983) (employee has an obligation, even during off-duty hours, to honor the standards of behavior that the employer has a right to expect of the employee; claimant was employed as a public servant by a government agency which must maintain the highest standards of integrity and incorruptibility; the continued employment of a convicted felon constitutes a genuine threat to the integrity of the agency and reflect unfavorably on the agency in the public eye, disqualification due to misconduct sustained); *Matter of Gilbert*, 38 A.D.3d 961 (3d Dep't 2007) (misconduct found where claimant, a state trooper engaged in off-duty conduct that was in willful disregard of employer's standards of behavior); Appeal Board No. 587755 (claimant's plea to three felony counts, including the criminal possession of controlled substance, raised a serious question regarding her integrity with respect to her position as a personal care aide, reflected unfavorably on the employer, and thus conduct bears a relationship to her work).

[89] *Matter of Cummings*, 69 A.D.3d 1088 (3d Dep't 2010) (citations omitted) (finding the claimant's guilty plea to criminal charge of offering to file a false instrument was sufficiently related to his duties as a field representative for utility employer, given that his responsibilities include going into customer homes and accepting payments).

[90] Appeal Board No. 553904 (citing *Matter of Sinker,* 89 N.Y.2d 485 (1997) (addressing felony misconduct)); Appeal Board No. 580930 ("Criminal acts involving the breach of a duty which the claimant owes to the employer will depend on the nature of the employment involved")

[91] Appeal Board Nos. 553904 and 580930.

[92] Appeal Board No. 581562.

[93] Appeal Board No. 546614 (registered nurse pled guilty to petit larceny sufficiently related to job responsibilities).

[94] Appeal Board No. 549794 (claimant, a trusted bank employee, violated the standards of behavior which the employer had a right to expect).

criminal charges of assault,[95] and in circumstances where a claimant pleads guilty to or is convicted of crimes related to drugs that raise serious questions as to the claimant's integrity.[96] However, it has been held there was an insufficient relationship between off-duty criminal conduct and a claimant's job in circumstances where an elevator repairman was arrested for possessing marijuana,[97] a sales representative for a food distributor was convicted of criminal solicitation,[98] a janitor's arrest for assault,[99] and where an aide in a nursing home was arrested for violation of an order of protection.[100]

It has been consistently held that behavior by a public employee, including off-duty behavior, that undermines public trust, and which would tend to bring discredit on the agency constitutes misconduct.[101]

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[95] Appeal Board No. 554837 ("This causation of injury to another person, with a criminal state of mind, is critically connected to the claimant's job, which required him to provide direct care to a vulnerable population of developmentally disabled adults in their place of residence").

[96] *Matter of Mora,* 175 A.D.2d 442 (3d Dep't 1991) (claimant's conviction of intent to sell a controlled substance constituted misconduct, even where the misconduct was committed during off-duty and non-working hours because it raised serious questions as to the worker's integrity and thus bears a relationship to work); Appeal Board No. 587755 (personal care aide who pled guilty to various felonies related to drugs and fraud raised serious questions regarding her integrity with respect to her position); Appeal Board No. 544097A (claimant's conviction of a serious Federal felony drug crime committed during non-working hours violated the employer's standards of conduct and raised questions as to the claimant's integrity, claimant disqualified due to misconduct).

[97] Appeal Board No. 551123 (stating in dicta "We further note that given the nature of the claimant's job duties, this incident was not in connection with the claimant's employment").

[98] Appeal Board No. 561391 (the claimant's "conviction for criminal solicitation stems from an incident which was completely unrelated and not in connection with his employment").

[99] Appeal Board No. 557909 ("the claimant cannot necessarily be expected to understand that a charge apparently arising from an incident of domestic violence would render her unfit or unable to work as a janitor").

[100] Appeal Board No. 568213 ("we note that the claimant's misdemeanor conviction for off-the job behavior was not for any act of theft or dishonesty and did not involve a public employer. Thus, we find that the incident was not in connection with his employment") *cf. Matter of Markowitz*, 94 A.D.2d 155 (3d Dep't 1983).

[101] *Matter of Markowitz*, 94 A.D.2d 155 (3d Dep't 1983); *Matter of McCallum*, 126 A.D2d 833 (3d Dep't 1987) (claimant who was employed by municipality refused to pay overdue parking tickets as requested by employer; the claimant's conscious and intentional disregard of the governmental employer's standards of behavior constitutes misconduct); *Matter of Vetro*, 94 A.D.3d 1321 (3d Dep't 2012) (claimant who was a high school principal pled guilty two counts of harassment and lost employment due to misconduct); Appeal Board No. 591784 (public elementary school cleaner who pled guilty to felony DWI lost employment due to misconduct); Appeal Board No. 590376 (per diem substitute teacher for municipal school district who pled guilty to multiple misdemeanors including driving while intoxicated, resisting arrest and aggravated unlicensed operation of a motor vehicle lost employment through misconduct); Appeal Board No. 583726 (probationary sanitation worker for municipality who pled guilty to grand larceny lost employment due to misconduct); Appeal Board No. 580607 (probationary peace offer employed by municipality who pled guilty to

ATTENDANCE VIOLATIONS

Where the claimant is not discharged for the underlying criminal conduct but instead for his or her failure to attend work due to incarceration, the analysis still focuses on whether the claimant engaged in volitional conduct leading to the inability to attend work.[102] It is not controlling that the criminal acts leading to a claimant's incarceration occurred before his or her employment, as a subsequent failure to report to work violates a reasonable condition of employment: regular and punctual attendance[103] However, if the absence is for a short duration and there is no evidence that the claimant received prior warnings or otherwise violated the employer's attendance policies, it may not rise to the level of misconduct.[104] Additionally, even where the incarceration is for a longer period, if the evidence does not establish that the claimant engaged in the underlying conduct and the continued incarceration is due to an inability to post bail, the claimant's absence from work does not rise to the level of misconduct.[105]

FAILURE TO REPORT AN ARREST WHILE EMPLOYED

When a claimant is discharged for failing to notify the employer of an arrest, the focus of the analysis is on whether the claimant knew or should have known he or she was required to report the arrest. This necessarily turns on whether the employer has a policy regarding the conduct and the wording of such a policy.[106]

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criminal possession of stolen property lost employment due to misconduct); Appeal Board No. 551677 (commission of a crime by a corrections officer was inextricably intertwined with the performance of his duties).

[102] Appeal Board No. 584857 (claimant's failure to call or report for work due to incarceration cannot be excused as she pled guilty to several misdemeanors and was therefore deemed to be at fault for her inability to report to work, made no difference that the criminal conduct occurred prior to the claimant's employment); Appeal Board 541751 (claimant's incarceration which resulted in his failure to report to work due to incarceration was result of his own culpable conduct since he subsequently pled guilty to felony); *but see,* Appeal Board No. 580118 (no misconduct where claimant's no call no show was a result of incarceration after an off-duty incident and the claimant pled guilty to a non-criminal violation in order to get out of jail) (citing Appeal Board No. 555689); Appeal Board No. 541065 (no misconduct where claimant's no call no show for 2 consecutive days was due to incarceration where there was no evidence of criminal conduct by claimant).

[103] Appeal Board No. 584857 (citing Appeal Board Nos. 365575 and 547600).

[104] Appeal Board No. 554799 and 541065 (claimant's two-day absence as a result of incarceration did not rise to level of misconduct where his absences would have only constituted 2 violations under the employer's policy and the claimant had no prior warnings regarding attendance).

[105] *Matter of Benjamin*, 175 A.D.2d 936 (3d Dep't 1991) (claimant did not engage in misconduct where he was incarcerated for a month on drug charges due to his inability to post bail which was not a willful or deliberate act, the criminal charges were later reduced to a disorderly conduct which would not have prevented him from reporting for work and there was no evidence the claimant was involved in any drug related activity).

[106] Appeal Board No. 590838 (claimant engaged in misconduct by failing to report arrest to employer where employer's policy stated that any employee arrested for any reason must report the arrest to the employer before the next scheduled shift and that if an employee is arrested and does not notify the employer as required, the employee will be

FAILURE TO DISCLOSE PRIOR CONVICTIONS ON AN EMPLOYMENT APPLICATION

An individual has an obligation to answer truthfully a valid employer inquiry into prior criminal convictions. An omission or misrepresentation on a job application (including the concealment of a criminal conviction) constitutes misconduct, especially where a claimant has been informed that such an omission is grounds for immediate discharge.[107]

Additionally, the fact that a claimant has received a Certificate of Relief from Civil Disabilities does not relieve the claimant from the obligation to disclose the prior conviction.[108]

In certain circumstances, the failure to disclose a prior conviction may be excused. New York State Executive Law §296(16), prohibits an employer from questioning an individual about criminal matters which were resolved in favor of the individual, which were sealed, or which resulted in a youthful offender adjudication; or from taking any adverse action based on those factors. The failure to disclose the prior conviction under those circumstances does not constitute misconduct.[109] Other laws (for example, New York City's Fair Chance Act, discussed below) also place limits on when and how an employer may inquire into an applicant's criminal background.

FAILURE TO PARTICIPATE IN EMPLOYER'S INVESTIGATION

A claimant's refusal to cooperate with an employer's internal investigation into criminal charges in not considered misconduct, as a claimant has the right to exercise his Fifth Amendment right

terminated from employment when the employer otherwise learns of the arrest, regardless of the nature of the arrest or the eventual disposition of the case); Appeal Board No. 590503 (claimant did not engage in misconduct where the employer's policy required the claimant to notify the employer of any arrest but did not identify consequences for failing to notify the employer).

[107] *Matter of Dockal,* 34 A.D.3d 1081 (3d Dep't 2006); Appeal Board No. 546045A (citing Appeal Board No. 535584).

[108] *Matter of Ghorab*, 219 A.D.2d 793 (3d Dep't 1995) ("Although a certificate of relief from disabilities serves to remove any bar to an individual's employment automatically imposed by law, it does not relieve an individual from disclosing a prior criminal conviction").

[109] Appeal Board No. 549835 (claimant believed that misdemeanor convictions while the claimant was a youthful offender were sealed and did not reveal their existence on pre-employment application, but their existence was revealed in pre-employment background check; claimant had no reason to believe that they were not sealed and his failure to include them on the application does not constitute misconduct).

against self-incrimination.[110] Additionally, a claimant's refusal to take a polygraph exam, by itself, is not evidence of misconduct.[111]

However, a public sector employee's refusal to answer an employer's questions during a disciplinary investigation, provided the responses may not later be used against the employee in a criminal proceeding, may rise to the level of misconduct for unemployment insurance purposes.[112]

EMPLOYMENT DISCRIMINATION BASED ON PRIOR CRIMINAL HISTORY

New York City prohibits certain inquiries into the criminal background of a prospective or current employee, the Fair Chance Act, commonly referred to as "Ban the Box". The law prohibits employers having four or more employees from inquiring about a job applicant's criminal history (including pending arrest) until after a contingent offer of employment is made to that individual. The Fair Chance Act restricts the employer's direct inquiry concerning the prospective or current employee's criminal history (for example, by excluding certain questions from the employment application form); or indirect inquiry regarding the same (for example, by running an undisclosed background check). The Fair Chance Act also requires the employer to afford the prospective or current employee notice of any adverse results of the background check and an opportunity to address the same before a contingent offer of employment is rescinded.

Exemptions to the law include employers who are required by federal, state, or local law to conduct a criminal background check[113] or where such laws bar employment based on certain convictions (for example, businesses regulated by the Department of Health, the Office of Mental Health, or the Office for People with Developmental Disabilities), certain employers in the financial services industry, law enforcement, and certain NYC positions. Guidance provided by the NYC

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[110] Appeal Board No. 569601 (claimant's refusal to participate in an internal investigation into claimant's alleged criminal conduct, without more, was not misconduct); Appeal Board No. 552164 (school employee who declined to answer the district's questions about his arrest upon advice of counsel was not misconduct); Appeal Board No. 583756 ("The Board has held that a claimant does not engage in misconduct when he declines to answer questions in exercising his Fifth Amendment right not to incriminate himself (Appeal Board No. 569601, Appeal Board No. 552164). The…Third Department… has held that the State may not deny a claimant Unemployment Insurance benefits because a claimant exercised his or her rights under the US and New York State Constitutions." (*Kubis v. Ross*, 62 A.D. 2d 534")).

[111] *Claim of Kendrick*, 102 A.D.2d 931 (3d Dep't 1984) (claimant's refusal to take a polygraph test during employer's investigation into theft of which he was the suspect, was not disqualifying misconduct).

[112] Appeal Board No. 551019 (citing *Matter of Altieri,* 92 A.D.2d 1028 (3d Dep't 1983)).

[113] Appeal Board No. 591160 (claimant, a custodian at a non-profit providing, in part, day care services, was fired two months after he was hired because he had answered "no" to a question about prior criminal convictions, even though he had a felony conviction; in finding misconduct, the Board noted that the employer was required under New York City's Health Code to conduct a criminal background check).

Commission of Human Rights indicates that the law applies to all decisions that affect the terms and conditions of employment, including discharge, transfer, and promotion, as well as hiring.

FELONY MISCONDUCT

Labor Law §593(4) provides that the claimant is automatically disqualified from benefits for twelve months after the claimant loses employment as a result of an act constituting a felony in connection with such employment provided the claimant is duly convicted thereof or has signed a statement admitting that he or she has committed such an act.[114] Absent a conviction or a signed, written admission, a disqualification based on felony misconduct cannot be sustained.[115]

PROCEDURAL CONCERNS: HOLDING A HEARING DURING PENDENCY OF CRIMINAL PROCEEDINGS

There are times when a claimant appears for a hearing while criminal charges are still pending. When the criminal charges are the subject of the unemployment hearing, the claimant should be advised that he or she will be required to answer questions, under oath, about the underlying criminal matter. The claimant should also be advised that anything he or she says at the unemployment hearing could be used against him or her in the criminal proceeding. Further, the claimant should be notified that an adverse inference may be drawn in the event that he or she refuses to answer question by invoking his or her 5th Amendment right against self-incrimination.[116]

In the event the moving party decides not to move forward with the case because they wish to wait for the disposition of the criminal charges, the judge should inform the party that a default decision will be entered indicating that the party did not wish to proceed with the case until the resolution of the charges. The judge should then inform the party that they must apply to reopen the matter within a reasonable time after the conclusion of the criminal matter.[117]

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[114] Appeal Board No. 571040 (citing *Matter of Powers,* 177 A.D.2d 833 (3d Dep't 1991)).

[115] Appeal Board No. 581042 (no felony misconduct where claimant charged with class D felony but pled guilty to a misdemeanor); Appeal Board No. 571040 (citing *Matter of Powers,* 177 A.D.2d 833 (3d Dep't 1991) (finding felony misconduct where claimant pled guilty to securities fraud and conspiracy to commit securities fraud based on his actions while working for and on behalf of his employer)).

[116] *See, e.g., Terra v. Department of Health,* 199 A.D.2d 577 (3d Dep't 1993) ("a party's invocation of the Fifth Amendment in a civil or administrative proceeding may form the basis of an adverse factual inference")).

[117] Appeal Board No. 580930 (Board found the employer's application to reopen more than two years after first hearing scheduled but only one day after the conclusion of the underlying criminal proceeding was reasonable, citing new evidence regarding the claimant's convictions); *but see,* Appeal Board No. 568938 (finding delay in application to reopen of 3½ months after conclusion of criminal matter to be unreasonable).

2.2.6 INSUBORDINATION

Insubordination can be generally defined as a willful or intentional failure to obey a lawful and reasonable request of a person in authority or an action which exhibits a lack of respect or harassment directed towards a supervisor. It is necessarily a fact-specific inquiry and what constitutes "insubordination" may, in some circumstances, be dependent upon how the term is defined in the employer's policy, regulation or union contract.[118] However, a finding of misconduct for engaging in insubordinate behavior is not precluded even where the employer does not have a policy forbidding such conduct.[119]

FAILURE TO OBEY A DIRECTIVE

In determining whether a refusal to follow a directive of a supervisor constitutes insubordination that rises to the level of misconduct, the Board and Court analyze whether the directive was reasonable in nature and was part of the claimant's expected job duties. Additionally, the Board and Court evaluate whether the claimant had a compelling reason for refusing the request and, in many circumstances, whether the claimant had received prior warnings for engaging in similar behavior.

REASONABLENESS OF DIRECTIVE

It has been held that a supervisor's directive, related to the performance of a claimant's job duties and in relation to the operation of the employer's business, is reasonable in nature.[120] In many

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[118] Appeal Board No. 553443 (The union contract defined the term insubordination "in pertinent part, [as] the willful refusal or failure to carry out of a reasonable direct order"); Appeal Board No. 556686 ("We note that while the employer policy prohibits insubordination, the policy does not define insubordination or provide examples of conduct that is deemed to be insubordination"); Appeal Board No. 555579 ("Regardless of the employer's definition of insubordination, failure to respect a supervisor's personal space typically does not constitute insubordination for purposes of the Unemployment Insurance Law").

[119] Appeal Board No. 587344 ("in general no policy against or warning for insubordination is required for insubordinate conduct to rise to the level of misconduct for unemployment insurance purposes").

[120] Appeal Board No. 580775 (finding insubordination rising to the level of misconduct where the "employer's directive was within, or reasonably related to, the scope of the claimant's duties that included simple cleaning tasks in common areas" after being told that his continued refusal would be considered insubordination and subject him to discharge); Appeal Board No. 587344 (finding insubordination rising to the level of misconduct where the claimant continued to refuse a directed transfer reasonably based on staffing needs where he had previously worked at the location of the transfer); Appeal Board No. 567001(finding insubordination rising to the level of misconduct where claimant, a CDL truck driver refused directive to off-load a truck when he was not driving, believing it was not part of his job duties, where he had been previously warned for insubordination and acknowledged that he had previously off-loaded trucks when on route); Appeal Board No. 557271 (claimant, a 26 year employee, found not to have engaged in misconduct where he refused directive to perform tasks that he had never been asked to perform previously); *Matter of Velazquez*, 204 A.D.2d 928 (3d Dep't 1994) (cleaning person disqualified for failing to follow supervisor's instructions as to the performance of the job); *Matter of Sweat*, 198 A.D.2d 695 (3d Dep't 1993) (claimant disqualified for repeatedly refusing to clean certain bathrooms, a task which was clearly part of her job duties); *Matter of Speciner*, 166 A.D.2d 848 (3d

circumstances, the directive may be considered reasonable even if it involves working different hours,[121] performing additional duties,[122] or performing duties away from the claimant's normal job site.[123] Further, directives requiring an employee to sign off on receipt of new policies related to the reasonable operation of the business[124] and to sign for receipt of disciplinary warnings, so long as the signature does not equate to agreement with the contents thereof,[125] are reasonable, and a claimant's failure to comply may rise to the level of misconduct.

Dep't 1990) (claimant's refusal to prepare income tax return at request of law firm partner constituted misconduct where request was reasonable, related to claimant's job duties, and did not require claimant to do anything unexpected or demeaning in nature).

[121] Appeal Board No. 581168 (finding claimant engaged in insubordination for refusing employer's reasonable directive that claimant during a special event outside of normal working hours and claimant's contention that he would have had to work unreasonable number of hours was not compelling, as he was a salaried employee, was aware that he could be required to work mornings or evenings as needed, had worked at least once in the evening in the past, and had rejected the employer's offer to close the store for a few hours that day to cut down on his hours worked); *Matter of Bisson*, 170 A.D.2d 738 (3d Dep't 1991) (employer's directive for claimant to work an additional eight hours per year taking inventory was reasonable and her refusal to do so constituted misconduct where she did not have a compelling reason for refusing overtime work); *Matter of Elbaz,* 30 A.D.3d 954 (3d Dep't 2006) (claimant, a dishwasher, engaged in insubordination rising to the level of misconduct when he refused to comply with a directive to clean up garbage after he had been told that he could be fired if he continued to refuse despite claimant's contention that it was not part of his duties as a dishwasher); *but see, Matter of Wise,* 81 A.D.2d 961 (3d Dep't 1981) (claimant did not engage in misconduct when she refused to work additional evening during the week, where contract required only one late night per week and refusal was neither detrimental to employer's interest nor in violation of reasonable work conditions).

[122] *Matter of Oswald*, 172 A.D.2d 938 (3d Dep't 1991) (employer's request for claimant to perform new job responsibilities that would not extend work day and were not beyond skill level were reasonable in light of the employer's financial condition at the time).

[123] Appeal Board No. 544540 (employer's directive that the claimant help move boxes from off-site location to the employer's premises was not unreasonable as the claimant's custodial duties included helping out as well as cleaning and his continued refusal to do so was misconduct).

[124] Appeal Board No. 557099 (employer's directive that claimant sign employer's new social networking policy was reasonable and claimant's refusal constituted insubordination rising to the level of misconduct); *but see, Matter of Waszkiewicz,* 257 A.D.2d 882 (3d Dep't 1999) (where claimant was advised by attorney not to sign a conflict of interest and confidentiality agreement as written, the claimant had a legitimate reason for refusing); *Matter of Jackson,* 120 A.D.3d 1503 (3d Dep't 2014) (despite not having received advice from an attorney, claimant's refusal in signing extension of probation document was not misconduct as she would have waived important rights by doing so).

[125] Appeal Board No. 574492 (no misconduct where claimant refused to sign warning notice admitting to Medicaid fraud where although the warning included a space for employee comments, there was no acknowledgment by the employer that her signature constituted only acknowledgment of receipt and not agreement with the contents); Appeal Board No. 572139 ("a claimant will only be disqualified for refusal to sign a warning letter when there is space for the employee to write a comment or where there is language that the employee's signature signifies receipt of the warning only"); Appeal Board No. 546995 ("we have repeatedly held that an employee may refuse to sign a warning if the signature may be taken as agreement, rather than simple acknowledgment of receipt, and there is no space for the employee to write his or her comment about the conduct complained of in the warning").

If it is determined that the directive or policy is unreasonable in nature, a claimant's refusal to comply does not constitute misconduct. For example, no misconduct has been found where a claimant fails to follow intrusive policies regarding his or her physical appearance unless the employer demonstrates there is a compelling need for the policy.[126] Additionally, policies or directives violating existing laws or regulations,[127] directives that would likely place employees' personal safety at risk,[128] and unwritten policies directing employees to have all conversations in English only,[129] have been found to be unreasonable.

In determining whether mandatory referrals to an employee assistance program will be considered reasonable, the Board analyzes whether there is a contract, policy or regulation that would put a claimant on notice he or she could be subject to such referral and whether the referral itself was reasonable under the circumstances. [130]

COMPELLING REASON FOR REFUSING DIRECTIVE

In circumstances where the claimant has a compelling reason for refusing an employer's directive, the Board has declined to find the claimant's actions rise to the level of misconduct. Generally,

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[126] Appeal Board No. 578221 ("We have previously held that an employer must have a compelling reason for intrusive policies regarding an employee's physical appearance before an employee's refusal to comply with such a policy may be considered misconduct"); Appeal Board No. 460731A (claimant did not engage in misconduct for refusing to follow employer's policy prohibiting facial hair because absent a compelling reason for an intrusive policy, the policy is unreasonable).

[127] Appeal Board No. 590272 (claimant had a compelling reason for refusing directive of employer which would have required driving in excess of 10 hours in a 14-hour period and be in violation of Department of Transportation regulations).

[128] Appeal Board No. 590775 (employer's directive to fill plastic garbage bags with debris and lower down to ground by rope and pulley was unreasonable where parties agreed nylon bags were stronger, workers had asked for nylon bags the day before because earlier in week garbage bag broke and workers had to scatter to avoid being hit by debris, and claimant had received OSHA training not to comply with directives that would put his coworkers in danger).

[129] Appeal Board No. 546488 (employer's unwritten policy prohibiting employees from speaking a foreign language was overly restrictive and therefore unreasonable).

[130] Appeal Board No. 588677 (employer's directive that claimant contact EAP was unreasonable where there was no contract, policy or regulation in place that would have put the claimant on notice he would be subject to such referral and where the employer did not have reasonable grounds for making referral in the first place); Appeal Board Nos. 544927 and 588167.

this arises in the context of safety concerns,[131] or conflicting directives or prior permission to engage in the conduct.[132]

PRIOR WARNINGS

The Board has previously held that generally for a refusal to follow a specific directive to rise to the level of misconduct, a claimant must be on notice that the refusal will place his or her job in jeopardy.[133] A claimant can reasonably be said to have notice his or her job is in jeopardy if the evidence establishes there are prior warnings for similar conduct[134] or if the claimant was warned during the final incident that continued refusal will result in discharge.[135]

Under some circumstances, especially where the claimant is in a safety sensitive position[136] or where the claimant's conduct in refusing the directive is particularly egregious[137], it has been held that no prior warning is needed for a finding of misconduct.

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[131] Appeal Board No. 590775 ("claimant's refusal to comply with an unreasonable directive that he genuinely and reasonably believed would jeopardize the safety of others is not misconduct") (citations omitted); Appeal Board No. 554184 (claimant had a compelling reason to refuse employer's directive to leave the worksite as he stayed to resolve hazardous condition prior to leaving).

[132] Appeal Board No. 567127 (claimant's refusal to comply with manager's directive to remove his blue hat was not insubordination when he had just been told by his supervisor that his hat was permissible); Appeal Board No. 551520 (claimant did not engage in misconduct when he failed to report to work as directed when he had obtained advance approval for the day off two weeks earlier).

[133] Appeal Board Nos. 577605 ("We have…held that a claimant must be alerted that her refusal to follow a specific direction will lead to termination before the claimant is fired") (citing Appeal Board 568925, 560090 and 544712); Appeal Board No. 547222 (finding insubordination rising to the level of misconduct where claimant had been repeatedly told by vice president to be quiet and clock out where she had been previously warned about inappropriate behavior despite claimant's perception that the vice president was behaving unfairly towards her and despite claimant's denial of engaging in inappropriate behavior leading to the prior warning); Appeal Board No. 572513 (claimant's action in refusing to leave her desk for lunch and at the end of her shift after being directed to do so was merely poor judgment and not misconduct where claimant was a long term employee with no previous relevant warnings and in light of claimant's past practice of staying at her desk during lunch break).

[134] Appeal Board No. 545806 (claimant had received two prior warnings for failing to follow directives so she knew or should have known she was placing her job in jeopardy by refusing supervisor's directive); *Matter of Setzer,* 69 A.D.3d 1087 (2010) (claimant found to have engaged in misconduct where there had been prior warnings for similar conduct).

[135] *Matter of De La Concha*, 271 A.D.2d 851 (3rd Dep't 2000); Appeal Board No. 592850.

[136] Appeal Board No. 572534 (Board noted that a warning is not absolutely necessary in insubordination cases particularly in light of claimant's occupation as an airport security agent because serious consequences could result for failure to follow a supervisor's directive).

[137] Appeal Board No. 579694 (claimant, a crew member at a fast food restaurant, refused to perform her job duties at cash register after having been told to do so when the employer had a line of customers waiting for service); Appeal Board No. 566895 (an employee need not be specifically warned that he must not disobey an employer's directive for such defiance to be considered insubordination for unemployment insurance purposes).

ABUSIVE BEHAVIOR

It has been held that abusive or disrespectful conduct towards a supervisor may constitute insubordination rising to the level of misconduct.[138] It has also been held that a claimant's protracted and offensive arguing with a supervisor,[139] use of profanity or vulgarity directed at a supervisor,[140] or circumstances in which the claimant invites his or her own discharge[141] may constitute disqualifying insubordination.

In contrast, the Board and Court have also held that employees are not required to respond to a supervisor in an absolutely docile or servile manner.[142] And, an employee's disagreement with the employer's practices in the context of friction in the workplace is not always deemed insubordination.[143] Moreover, the Court has also held that depending on the circumstances, the

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[138] *Matter of Setzer,* 69 A.D.3d 1087 (2010) (finding misconduct where in response to manager's question, claimant became obstinate, nearly touched manager during verbal exchange, and adamantly maintained that his actions were proper even though they were clearly against the employer's policy); *Matter of Houston,* 65 A.D.3d 773 (3d Dep't 2009) (claimant engaged in misconduct where she refused supervisor's directive to perform job duties while reading a magazine and repeatedly called the supervisor an idiot); *Matter of Montanye*, 10 A.D.3d 830 (2004).

[139] Appeal Board No. 589632 ("engaging in protracted offensive conduct toward a supervisor is a provocation which is equivalent to a deliberate attempt to cease employment and more than a petty irritability" and would rise to the level of misconduct) (citing *Matter of Raven,* 40 A.D.2d 128 (3d Dep't 1972)); Appeal Board No. 558873 ("Yelling and cursing at, and threatening, one's superior is misconduct," especially in light of prior warnings for insubordination).

[140] Appeal Board No. 592398 (claimant's refusal to leave workplace when directed and his profanity laced argument with supervisor in earshot of other worker constituted misconduct); Appeal Board No. 584851 (claimant engaged in insubordination rising to level of misconduct where he repeatedly refused to comply with reasonable directive of supervisor and made non-responsive, vulgar and offensive remark to the supervisor in response to inquiry asking for claimant to account for his non-compliance with directives); Appeal Board No. 568402 (claimant engaged in insubordination where he directed profanity towards supervisor in the presence of customers); *Matter of Scheider*, 201 A.D.2d 811, (3d Dep't 1994) (school employee disqualified for disruptive behavior and insubordination where he used vulgar language to his superior in the presence of students); *but see,* Appeal Board No. 561292 (claimant's use of vulgarity during conversation with employer about a potential reprimand over a situation he believed was an accident and not his fault was not misconduct where he was a long term employee and the disciplinary warning he received was over one year prior and did not involve use of vulgar language).

[141] *Matter of Amarante,* 50 A.D.3d 1288 (3d Dep't 2008) (insubordination rising to the level of misconduct found where he exclaimed "I'm doing this the best I can. Fire me, lay me off if you can do it better" as claimant invited his own discharge); Appeal Board No. 545003 ("It is well established that an employee's act in inviting his or her own discharge is insubordinate; and constitutes misconduct") (citing Appeal Board No. 196,420).

[142] *Matter of Raven*, 40 A.D.2d 128 (3d Dep't 1972) ("In the ordinary course of events there is no reason to expect that employees will at all times be absolutely docile or servile in regard to their immediate supervisor and/or employers"); *Matter of Irons*, 79 A.D.3d 1511 (3d Dep't 2010) (no misconduct where claimant and regional manager engaged in a heated discussion during which the claimant objected to reduction in staff hours, told director he did not know how to do his job and told him he was an idiot).

[143] *Matter of Irons*, 79 A.D.3d 1511 (3d Dep't 2010).

use of profanity may not necessarily constitute misconduct.[144] Further, if the evidence establishes that the claimant is merely expressing disagreement with the situation[145] or that it is an isolated instance of intemperate behavior,[146] the Board has declined to find misconduct.

2.2.7 DOCUMENT FALSIFICATION

"Falsification of an employer's business records, particularly when in violation of established record-keeping policies, has been held to constitute disqualifying misconduct"[147] so long as the evidence establishes that the falsification was either intentional in nature[148] or that the claimant had received prior warnings for similar conduct. [149]

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[144] Appeal Board No. 579807 (claimant's use of profanity towards a supervisor was not insubordination rising to the level of misconduct where the claimant was upset that he was being directed to perform tasks outside of what he believed were his known physical limitations and manager escalated the situation); Appeal Board No. 552474 ("The fact that the claimant used profanity and invited the employer to discharge him under circumstances where he reasonably believed he was about to be fired does not amount to insubordination") (citing *Matter of Marquez,* 107 A.D.2d 959 (3d Dep't 1985)).

[145] Appeal Board No. 585791 (no misconduct where claimant made a comment "This is not Russia. This is America where you have rights and you have a voice" while refusing to sign a warning with no space for comments as it was merely an expression of frustration).

[146] Appeal Board No. 596581; Appeal Board No. 553271 ("In the absence of a warning, the claimant's actions are at most a brief, isolated instance of intemperate speech."); *but see* Appeal Board No. 567716 (in light of claimant's prior recent warning vulgarity could not be excused as isolated instance of intemperate speech)

[147] *Matter of Wightman,* 80 A.D.3d 1044 (3d Dep't 2011) (citing *Matter of Downing*, 51 A.D.3d 1093 (2008)); *Matter of Rosa*, 45 A.D.3d 952 (2007); Appeal Board No. 541114 (holding claimant, who was responsible for reporting monetary shortages to accounting department, was discharged for misconduct where she directed subordinate to falsify employer's records to indicate customer had used $100 coupon when no coupon was used in order for the employer's books to appear balanced); Appeal Board No. 585885 (claimant engaged in misconduct where he falsified customer satisfaction surveys relied upon by employer to determine employees' bonuses in violation of employer's policy forbidding falsification of documents and misuse of data); Appeal Board No. 567143 (finding misconduct where employer's rule required employees to make only true and accurate entries on the employer's records and to not make false entries and claimant submitted falsified medical notes to the employer).

[148] Appeal Board No. 587631 ("Deliberate falsification of time records constitutes misconduct for unemployment insurance purposes and requires no warning").

[149] Appeal Board No. 586769 (claimant's failure to document dropped pill was misconduct where she had prior warnings for failure to properly document medication administration); Appeal Board No. 591844 (errors in claimant's progress notes on 31 occasions over 15-month period found to be unintentional and not rising to the level of misconduct absent prior warnings related to errors in documentation); Appeal Board No. 590975 (claimant's inadvertent incorrect entries on time sheet did not constitute deliberate falsification and did not rise to the level of misconduct, absent prior warnings).

TIME RECORDS

Falsification of time and attendance records has been held to constitute disqualifying misconduct,[150] particularly where a claimant has received a prior warning regarding such conduct.[151] However, no prior warning is required for this to constitute disqualifying misconduct if the evidence establishes the falsification was deliberate in nature.[152]

APPLICATION FOR EMPLOYMENT

The Court and Board have held that falsifying information on, or omitting information from, one's employment application constitutes disqualifying misconduct, especially where the application contains a statement that any falsification could be grounds for termination.[153] This is true notwithstanding a claimant's contention that the omission was inadvertent.[154]

MEDICAL RECORDS

The Board has previously held that falsification of a medical record constitutes misconduct, noting that the degree of care expected of a claimant must be commensurate with the potential for harm.[155] The Court has also held that a claimant's failure to comply with the employer's policies and procedure may constitute misconduct especially where the claimant is employed as a medical professional whose failure to adhere to prescribed safety procedures could jeopardize the safety

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[150] *Matter of Crawford,* 84 A.D.3d 1670 (3d Dep't 2011).

[151] *Matter of Diallo,* 263 A.D.2d 608 (3d Dep't 1999).

[152] Appeal Board Nos. 590975, 590688, 587659, 587631, 590529 (citing *Matter of Arcila,* 6 A.D.3d 921 (3d Dep't 2004)); Appeal Board No. 589075 ("We have previously ruled that a warning is not necessary to place an employee on notice that theft of time will jeopardize one's job") (citing Appeal Board No. 582672A); Appeal Board No. 547351 ("Abuse of the employer's time records constitutes dishonesty on the part of the employee resulting in financial loss to the employer and requires no prior warning that such behavior will not be tolerated").

[153] *Matter of Dockal*, 34 A.D.3d 1081 (3d Dep't 2006).

[154] *Matter of Dockal*, 34 A.D.3d 1081 (3d Dep't 2006); Appeal Board No. 588582; Appeal Board No. 591160 (citing *Matter of Miller,* 50 A.D.3D 1432 (3d Dep't 2008); *Matter of Dockel, supra*.).

[155] Appeal Board No. 571264A (where claimant was aware that medication administration record was not to be annotated prior to administering medications but had annotated the log prior to giving the medication and thereafter did not give it) (citing Appeal Board Case No. 561236); Appeal Board No. 563680 (claimant's indication in medical administration record that he had administered a medication when he had not constituted record falsification); Appeal Board No. 542927 (misconduct found where residence counselor falsely indicated on a medication log that she had administered a medication and had received prior warnings regarding medication administration errors).

of a patient.[156] Further, the actions of persons responsible for patient care who have made errors, including the failure to properly transcribe doctor's orders and properly note the administration of medications and patient status, rise to the level of misconduct.[157] Once the responsible individual is warned to take care and is capable of doing so, continued errors are no longer excusable as poor judgment and / or poor performance.[158] Further, the lack of a prior warning does not necessarily preclude a finding of misconduct where the claimant's falsification of medical records has the potential for medical harm to patients.[159]

2.2.8 POOR PERFORMANCE VS. PATTERN OF CONDUCT

While actions which display inefficiency, negligence or poor judgment may provide valid causes for discharging an employee, they do not generally disqualify a claimant from receiving unemployment insurance benefits.[160] In order for such conduct to be disqualifying, it must be grossly negligent or constitute repeated acts of carelessness that have persisted after numerous warnings.[161]

PERSISTENT NEGLIGENCE OR PATTERN OF BEHAVIOR

In determining whether persistent negligence after warning rises to the level of misconduct, the Board and Courts evaluate the extent to which the claimant was previously warned, whether the claimant was following the employer's procedures and observing safeguards in an effort to avoid errors and how many errors were made in relation to the amount of work the claimant was performing.[162] Further, with regard to medical professionals, the Court and Board have held that

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[156] *Matter of Jill,* 23 A.D.3d 979 (3d Dep't 2005) (claimant engaged in misconduct where her notation in the medical chart did not accurately reflect the procedure performed, she could have been more thorough and had been previously warned about job performance).

[157] Appeal Board Nos. 568846, 559208, and 554578

[158] Appeal Board No. 590157

[159] Appeal Board No. 584660 (citing Appeal Board No. 571264A); Appeal Board No. 591964 and 584168 ("lack of a prior warning is not controlling when there is the potential for medical harm").

[160] *Matter of Arroyo*, 145 A.D.2d 886 (3d Dep't 1988); *Matter of James*, 34 N.Y.2d 491 (1974); Appeal Board No. 546036 (citing Appeal Board Nos. 518514, 503751A and 540187).

[161] *Matter of Mitch,* 247 A.D.2d 738 (3d Dep't 1998); *Matter of Weinfeld,* 135 A.D.2d 880 (3d Dep't 1987); Appeal Board Nos. 581353, 575106, 563449 and 552268.

[162] Appeal Board No. 591703 (claimant responsible for labeling patient specimens found to have engaged in persistent negligence where he had been repeatedly warned about following the employer's labeling procedures and whether the claimant's final error caused actual patient harm was not dispositive); Appeal Board No. 576776 (claimant's continued

once an individual has been put on notice that particular acts or omissions will place his or her job in jeopardy, subsequent negligent acts or omissions may rise to the level of misconduct.[163]

Additionally, in situations where a claimant continues to engage in unprofessional behavior despite repeated warnings, the Board has found the pattern of behavior constitutes misconduct.[164]

GROSS NEGLIGENCE

It has also been held that gross negligence constitutes misconduct. Gross negligence is conduct demonstrating a reckless disregard for the rights of others or intentional wrongdoing.[165] Generally, where a claimant engages in actions that constitute violations of safety policies and that conduct

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errors in paperwork after final warning was more than poor performance and rose to the level of misconduct); *but see,* Appeal Board No. 574650 (in light of fact that claimant processed up to 100 requisitions and specimens a day, no persistent carelessness could be found where only four errors were documented in a 9 month time frame); Appeal Board No. 575106 (two occurrences over a one year time frame were not considered to be gross negligence or persistent carelessness); Appeal Board No. 563449 ("Considering that there were three such occurrences in the space of two years, while the claimant was drawing specimens from about twenty patients per day on five days a week, we find that the claimant's failings were not the result of gross negligence or persistent carelessness, but rather constituted inefficiency or poor performance not rising to level of misconduct for unemployment insurance purposes"); Appeal Board No. 5527453 (claimant, a tractor-trailer driver, failed to follow three known safety procedures, with the result that the truck, while being unloaded, rolled across the yard); Appeal Board No. 549343 (claimant, a manager at a fast food restaurant, left a bank deposit in her unattended, unlocked truck, rather than making the deposit as required, with the result that the money was missing from her truck when she checked the next day).

[163] *Matter of Mitch,* 247 A.D.2d 738 (3d Dep't 1998) (claimant, a nurse in an alcohol detoxification unit, was found to have engaged in persistent negligence rising to the level of misconduct where she had been repeatedly warned about medication administration procedures and was told that further errors would result in discharge); *Matter of Briere,* 238 A.D.2d 647 (3d Dep't 1997) (claimant's failure to immediately record 10 or 11 disbursements of medication despite having been previously warned, constituted misconduct); *Matter of Anderson,* 255 A.D.2d 678 (3d Dep't 1998) (claimant's medication error after having been previously warned was negligence that persisted despite warnings); *Matter of Kovalskaya,* 16 A.D.3d 955 (3d Dep't 2005) (claimant's continued errors after warning reflected more than simple carelessness, compromising the treatment of patients); *Matter of Trunzo,* 145 A.D.3d 1308 (3d Dep't 2016) (claimant's actions in failing to obtain a doctor's order prior to putting over-the-counter diet pills in a patient's daily mediset in violation of the employer's policy for a period of 5 months was found to be more than mere negligence notwithstanding the fact that she had not received any prior warnings); *Matter of Weinfeld,* 135 A.D.2d 880 (3d Dep't 1987).

[164] Appeal Board No. 549058 (finding claimant engaged in a pattern of behavior rising to the level of misconduct where claimant repeatedly was warned about her need to follow supervisor's directives and not to interfere with jobs of others); Appeal Board No. 557068 (claimant found to have engaged in a pattern of behavior rising to the level of misconduct where he was engaging in a pattern of work refusal and sowing discord among his coworkers after having been repeatedly instructed to work cooperatively and that failure to improve behavior could result in discharge); Appeal Board No. 544642 (claimant's continued pattern of unprofessional behavior after warning was more than isolated incident but rather a continued pattern of behavior).

[165] Appeal Board No. 577424 (distinguishing gross negligence and ordinary negligence).

poses a risk of serious harm to others or where there is an extraordinary standard of care expected from the claimant, gross negligence rising to the level of misconduct can be found.[166]

ACCIDENTS

Ordinary negligence in the operation of a motor vehicle does not rise to the level of misconduct, even if traffic tickets are issued.[167] In order for a claimant's involvement in an accident to be misconduct, there must be a showing of gross negligence.[168] Moreover, the mere fact that a claimant may have been involved in multiple accidents does not change the nature of the occurrences from accidental to intentional, and does not necessarily establish that more than negligence was involved in the incidents.[169]

2.2.9 SOCIAL MEDIA ISSUES

Whether particular statements or use of social media is considered to be misconduct for unemployment insurance purposes will depend upon the seriousness and intent of the conduct in which the claimant engaged and the employer's policy regarding use of social media. Some of

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[166] Appeal Board No. 589083 (gross negligence found where claimant's conduct in failing to ensure all pilot lights were extinguished while purging a gas line, in violation of the NYS fuel in gas code, posed risk of serious harm); Appeal Board No. 587605 (claimant's conduct in not securing air brake on school bus, resulting in the bus rolling forward into another bus on school grounds in close proximity of students was found to be gross negligence); Appeal Board No. 547368 (gross negligence found where claimant hit three children with his school bus despite there being a crosswalk, a crossing guard and two stopped cars); Appeal Board Nos. 559028, 561236 and 546431 (school bus drivers who failed to check the bus for small children engaged in gross negligence as they had a special duty of care to the children left in their care); Appeal Board No. 552743 (gross negligence found where claimant, a tractor trailer driver, left rig in neutral and idling, did not set brake on the tractor or the trailer part of the rig before he exited the vehicle – all in violation of normal safety procedures - resulting in the tractor trailer rolling across the yard and smashing into another vehicle, causing approximately $6,000 worth of damage); Appeal Board No. 549343 (gross negligence found where claimant, an assistant manager at a fast food restaurant who was responsible for making bank deposits, left a $3,211 bank deposit in her unlocked truck while she did her own personal banking, failed to realize that she did not make the deposit until the next day and was unable to find the deposit thereafter); Appeal Board No. 553581 (gross negligence found where claimant, a medical assistant whose duties including drawing blood handling specimens and data entry, mislabeled blood samples where she had been warned at least twice in the past few months for mislabeling samples and had told to use at least two identifiers to identify patient and failed to do so); Appeal Board No. 557891 (gross negligence found where claimant, ambulance driver, abandoned his vehicle at a red light to get ice cream while he was transporting a patient to a hospital); Appeal Board No. 584211 (gross negligence found where dump truck driver operated truck with dump bed in a raised position resulting in utility wires being pulled down and the employer's vehicle tipping over); *but see,* Appeal Board No. 586757 (declining to find gross misconduct where claimant was actively being deceived by fraudsters perpetrating a sophisticated scam).

[167] Appeal Board No. 542679 (citing Appeal Board Nos. 538568A and 519514).

[168] Appeal Board Nos. 546036 and 577424.

[169] Appeal Board No. 545546 (citing Appeal Board No. 469803).

the more common forms of inappropriate social media conduct include misuse of the employer's confidential information, misrepresenting the views of the employer, making disparaging remarks about the company, making threatening, harassing and / or discriminatory comments in a public forum that would tend to reflect poorly on the company, and having direct communications with co-workers or other individuals that are inappropriate, threatening, discriminatory or harassing in nature.

A finding of misconduct will depend upon whether an employer's policy is sufficiently specific to place a claimant on notice that particular behavior will place employment in jeopardy.[170] Violations of overly broad policies attempting to restrict employees' off duty behavior may not constitute misconduct unless there is a finding that the conduct is, in fact, related to employment.[171] Additionally, the Board has declined to find misconduct for inappropriate actions that are not specifically prohibited by the employer's social policy.[172]

Generally, a prior warning is needed before activities related to social media will be considered misconduct.[173] However, where the conduct is determined to be particularly egregious, for

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[170] Appeal Board No. 589836 (no misconduct where claimant posted a public comment in response to a video on a friend's Facebook page containing profanity, racially offensive language, and violent language. Board found that, without prior warning, employer's policy would not have placed her on notice that such conduct would place her job in jeopardy); Appeal Board No. 570939 (claimant had Facebook communications the employer deemed to be professionally unacceptable with a client however, the record established that the employer's policy encouraged social media contact with clients and the claimant's exchanges with client were an attempt to protect the client's trusts, claimant's actions found to be poor judgment and not misconduct).

[171] Appeal Board No. 562479 (the employer's social media policy, which forbid employees from using inappropriate language, vulgarities, or obscenities on social media sites and from using social media to embarrass the employer or other employees, was an attempt to control employee behavior during non-working hours).

[172] Appeal Board No. 567823 (no finding of misconduct where claimant, a security guard assigned to a high school, befriended and interacted with students on Facebook, had only been previously been told to be careful about who he was friends with on the site, employer's policy did not specifically prohibit claimant from socializing with students, and school's policy on socialization with students was not strictly enforced); Appeal Board No. 568205 (no misconduct where claimant, a teacher and basketball coach, was denied tenure, placed on probation and told to avoid having personal contacts with students and thereafter exchanged messages on Twitter with students where he was not specifically warned to refrain from using social networking sites to contact students, all his interactions were public and were not so explicitly offensive or egregious as to warrant a finding of misconduct despite employer's policy forbidding inappropriate behavior, including "frequent personal communication with a student (via phone, email, letters, notes, etc.) unrelated to course work or official school matters"); Appeal Board No 559762 (employer's policy forbidding "verbal assault" would not have put the claimant on notice that either his verbal exclamation in the workplace, or his comment on Facebook, neither of which was directed to a co-worker in the presence of the co-worker, would constitute a violation of employer policy that could result in his discharge).

[173] Appeal Board No. 574992 ("In light of the circumstances, the claimant's single instance of posting on social media to a closed group of other employees during work hours in an otherwise unblemished employment does not rise to misconduct"); Appeal Board No. 567852 (claimant, who was tagged in a photo taken in the workplace depicting employee horseplay did not engage in misconduct as evidence did not establish that the photo was taken after she had been warned for unprofessional behavior); Appeal Board No. 577021 (claimant engaged in misconduct when she posted a video on Instagram depicting two employees, a patient and the employer's logo with a caption "Boss is gone

example threatening behavior or behavior far exceeding the bounds of propriety, no prior warning is necessary for a finding of misconduct.[174]

To determine whether a posting constitutes a true threat, the Board evaluates whether the posting is reasonably interpreted as threating in nature and whether it is a direct and specific threat against the employer or its employees.[175] Additionally, the Board takes into consideration whether an individual is specifically named and whether the posting can be seen by those outside of the claimant's social network.[176]

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party time!" in violation of the employer's policy forbidding employees from use of social media during working hours or from making comments about patients or the company on social media where she had been previously warned for similar conduct).

[174] Appeal Board No. 579670 (aff'd by *Matter of Roy,* 138 A.D.3d 1284 (3d Dep't 2016)) (claimant engaged in misconduct where he made violent and sexually explicit videos using LEGO's that depicted the executive director, claimant's department head and two co-workers and publicly posted them on YouTube despite the fact that he did not identify them by name as it was clear he was depicting those individuals); Appeal Board No. 577798 (claimant engaged in misconduct where he made Craigslist post and posted video to YouTube referring to a co-worker by name and work location in which he called her vulgar and extremely offensive names, used threatening language and was wearing clothing displaying the employer's logo in the video. The fact the claimant was later diagnosed with Bipolar Disorder and Autism Spectrum Disorder did not excuse his conduct); Appeal Board No. 562681 (claimant engaged in misconduct where she posted comment on Facebook calling her supervisor by her first name and using extremely derogatory language. Board held "[g]iven the highly offensive nature of the comments communicated to co-workers, the claimant's actions are clear misconduct").

[175] Appeal Board No. 559118 (claimant found to have engaged in misconduct despite lack of employer's policy or prior warning where he posted a series of threatening remarks to his Facebook account and sent them to several co-workers, which referenced by name digging a grave and killing his supervisor and other co-workers, having the "devil in his head" and "f**king" his supervisor's wife and daughter); *compare* Appeal Board No. 562479 (claimant's posted references to the employer, including a vulgarity, complained of understaffing and one in which she stated the employer was going to hate her with a smiley face and the word "revengeee" were disrespectful comments but did not rise to level of misconduct since the evidence did not establish the claimant engaged in the behavior during working hours and was not a real threat); Appeal Board No. 566664 (claimant, long time employee of a county governmental office, posted comment on Facebook "YEAH, OK, I'VE HAD A "BREAKDOWN" BETTER TO SHOOT MY CO-WORKERS AND FAMILY MEMBERS WHO SCREWED ME OVER "RIGHT"?" in violation of the employer's policies including "Discourteous treatment of the public or any other conduct which does not merit the public trust," "Abusive, profane or threatening language to the supervisor, fellow employees or otherwise threatening, intimidating or coercing other employees," "Conviction of a crime or engaging in unlawful or improper conduct which:...b) results in the reluctance or refusal of other employees to work with her," "Inability to get along with fellow employees which adversely affects operational efficiency," and "Immoral conduct or indecency" was not misconduct where statement was not directed to anyone in particular and no evidence that the claimant had received notice identifying prohibited off-duty conduct); Appeal Board No. 553929 (no misconduct where claimant posted on Facebook that she wanted "murder to be legal for just one day"; made derogatory comments about the work ethic of two other nurses with whom the claimant worked, and indicated that she would not "literally kill them," but just wanted to "get them fired, ruin their lives and poke their eyes out with a 25-gauge needle" followed by the letters "LOL").

[176] Appeal Board No. 553929

2.2.10 DISCRIMINATION AND RETALIATION

Allegations of discrimination in a misconduct case could potentially arise in various ways. For example, a claimant who is discharged for engaging in discriminatory or harassing behavior towards another employee will generally be held to have lost his or her employment due to misconduct.[177]

Additionally, a claimant who is fired for reasons characterized as misconduct may contend the discharge was pretextual and the true reason for the discharge was discriminatory in nature or was in retaliation for the employee filing a complaint of discrimination or for reporting illegal or unsafe conduct by the employer in the workplace. In those circumstances, the claimant should be allowed to provide testimony in support of such an assertion. Anti-discrimination laws do not protect a claimant who clearly and unambiguously engaged in misconduct.[178]

There are a number of laws protecting employees from discrimination and from retaliation for exercising their rights under those laws.[179] Additionally, Labor Law §215 makes it illegal for employers (other than state government employers) to discharge, discriminate or retaliate against an employee for making a complaint about a possible labor law violation to the employer, making a complaint to the Department of Labor, providing information to the Department of Labor, testifying in an investigation or other proceeding under the Labor Law or exercising any rights protected under the Labor Law. An employer also cannot retaliate against a worker for reporting a violation of the Fair Play Act.[180]

Labor Law Article 20-C protects employees from retaliatory action for disclosing or threatening to disclose health, safety, or other violations in the work place.[181] Additionally, §11(c) of the

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[177] Appeal Board No. 546032 (claimant engaged in misconduct when she made overtly disrespectful, discriminatory and offensive remarks regarding Hispanics to a Hispanic co-worker, in violation of the employer's policy); Appeal Board No. 547526 (claimant engaged in misconduct when he violated the employer's sexual harassment and sexual discrimination policy by making lewd comments and gestures towards his subordinates).

[178] Appeal Board No. 589662, (claimant, who contended that her discharge was related to her pregnancy, was found to have engaged in misconduct because evidence established she had been discharged for repeatedly refusing an order from the manager, cursing at the manager while doing so).

[179] For a discussion of various anti-discrimination laws and their application, see Part II, Chapter 1, Voluntary Quit, Section 2.1.7, Discrimination / Harassment.

[180] Labor Law §861-f.

[181] The specific prohibition is at Labor Law §740(2): An employer shall not take any retaliatory personnel action against an employee because such employee does any of the following: (a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud; (b) provides information to, or testifies before, any public body conducting an investigation, hearing

Occupational Safety and Health Act (known as OSHA's Whistleblower Protection Program) prohibits employers from discriminating against their employees for exercising their rights under the Act. These rights including filing a complaint, participating in an inspection or talking to an inspector, and raising a safety or health complaint with the employer.

Employers are further prohibited from discharging or otherwise discriminating against an employee who has claimed or attempted to claim Workers' Compensation benefits or has participated in a Workers' Compensation proceeding.[182]

Health care workers may not be discharged for disclosing or threatening to disclose an employer's policy or practice that the employee believes constitutes improper patient care so long as the disclosure is reasonable, in good faith and made to a supervisor or public body. In order to receive this statutory protection, the employee must first inform a supervisor of the issue and give the employer a reasonable opportunity to address the concern.[183]

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or inquiry into any such violation of a law, rule or regulation by such employer; or (c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation.

[182] NYS Workers' Compensation Law §120.

[183] Labor Law §741.

Practice Tip:

In a case where the claimant contends that a discharge was actually in retaliation and not for the action or alleged action offered by the employer as the reason for the discharge, the record will need to be developed on the following points:

- Did the claimant complain to the employer about actions that were potentially discriminatory in nature?
- When was the complaint made and to whom?
- Did the person who discharged the claimant know about the claimant's prior complaint?
- The basis for the claimant's belief that his or her discharge (or suspension, where that is the basis for the separation) was retaliatory.
- Whether the employer has previously addressed behavior similar to the behavior leading to the claimant's discharge with other employees. Was the employer's disciplinary response in the previous circumstances similar to the discipline received by the claimant, if not, why?

In cases where a claimant is alleging he or she was discharged for reporting a violation of the law, the record should be further developed on the following:

- Was there actually a violation or, at least, did the claimant have reasonable grounds for believing the employer was violating a health or safety law?
- Did the claimant actually disclose a violation and if so, to whom?
- Did the claimant threaten to disclose a violation and if so, to whom?
- What was the proximity in time between the disclosure or threatened disclosure and the claimant's discharge?

If the employer denies any knowledge of a potential disclosure and the claimant admits that he only spoke casually to a co-worker reporting a violation, it may be credible the managers or those with authority over personnel matters were unaware of the threatened disclosure, thus making it is less likely that the personnel action was retaliatory in nature. However, even if the claimant only spoke to a co-worker or immediate supervisor, if the threatened disclosure became known to management, then additional testimony must be taken from the employer to determine whether the discharge was for a valid business reason or was retaliatory in nature.

2.2.11 PROTECTED ACTIVITIES UNDER THE NATIONAL LABOR RELATIONS ACT

Section 7 of the National Labor Relations Act ("NLRA" or the Act)[184] provides, in part, that private sector employees have the right "to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection."[185] Even employees who are not represented by a union have rights under the NLRA. Specifically, it protects the rights of employees who engage in "concerted activity," which is generally when two or more employees engage in activity for the improvement of wages or working conditions. The action of a single employee may be considered concerted if he or she involves co-workers prior to acting, tries to induce group action or acts on behalf of others. Some examples of protected concerted activity are:

- When two or more employees complain to an employer about issues related to pay, safety concerns, working conditions, hours, etc.
- When two or more employees discuss or complain about work-related issues, even if the discussion occurs on social media.
- When an employee speaks with an employer on behalf of one or more co-workers about improving workplace conditions.

Under the NLRA, it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[186] An employer cannot legally fire an employee for exercising his or her protected rights. Where a claimant is discharged for engaging in actions considered to be protected concerted activity under the NLRA, the claimant cannot be found to have engaged in misconduct for unemployment insurance purposes.

Some activities which have been found to be protected include: an employee's refusal to attend a meeting which might end in disciplinary action without having a union representative present;[187] employees who engage in vulgar, profane or inappropriate speech or post such language online during a labor dispute or during a union campaign so long as that speech does not tend to coerce or intimidate others from engaging in their section 7 rights[188]; an employee who raised her voice

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[184] 29 USC §§ 151-169.

[185] 29 USC §§157.

[186] 29 USC 158(a)(1).

[187] *Matter of Weingarten*, 420 US 251 (1975).

[188] *Phoenix Transit System*, 337 NLRB 510, 514 (2002) (even most repulsive speech enjoys immunity provided it falls short of deliberate or reckless untruth; federal law gives license to use intemperate, abusive, or insulting language without fear of restraint or penalty if the speaker believes such rhetoric to be an effective means to make a point).

in opposition to a directive given to her and her co-workers;[189] employees who use profanity towards their supervisors or in online postings when complaining about terms and conditions of employment, during a labor dispute or during union organizing so long as the speech is not so egregious as to lose protection under the NLRA,[190] or employees who walk off the job without permission because of a dispute regarding working conditions.[191]

This is true even where the employer has a written policy forbidding the conduct in question. The National Labor Relations Board ("NLRB") has found employer policies violate the NLRA if (1) the rule expressly restricts employees' exercise of their Section 7 rights; (2) employees could reasonably construe the rule's language to prohibit Section 7 activity; (3) the rule was promulgated in response to union or other Section 7 activity; or (4) the rule was actually applied to restrict the exercise of Section 7 rights.[192]

The NLRB has found that firing an employee for violation of a policy that is overly broad and unduly restricts disclosure of employee information violates the NLRA. For example, the NLRB has found the following types of policies unlawful:

Cooper Tire & Runner Co., 08-CA-087155 (June 5, 2015) (employer violated the NLRA when it fired an employee for his use of racial epithets and abusive and offensive language on a picket line); *Catalytic, Inc.* 275 NLRB 97 (1985) (claimant's use of profane language to the wife of a co-worker during labor dispute was protected under the Act); *Clear Pine Mouldings,* 268 NLRB 1044 (1984), *enf'd* 765 F.2d 148 (9th Cir. 1985) (citing *NLRB v. W.C.McQuaide, Inc.* 552 F.2d 519 (3d Cir. 1977) (employer can deny reinstatement to a striker if his misconduct is such that under the circumstances, it may reasonably tend to coerce or intimidate employees in the rights protected under the Act); *Linn v. United Plant Guards*, 383 U.S. 53 (1966) (protected concerted speech will not lose its protection even if it includes "intemperate, abusive and inaccurate statements.")); Appeal Board No. 565029 (although the Board did not cite the NLRA, claimant found not to have engaged in misconduct where he used vulgar and insulting comments on a picket line).

[189] *Gaylord Hospital*, 359 NLRB 143 (2013) (claimant found to have engaged in protected activity when she raised her voice while discussing a directive given to all employees in her unit).

[190] *Pier Sixty, LLC,* 362 NLRB No. 59 (2015) *enf'd* 855 F.3d 115 (2d Cir. 2017) (employer violated NLRA by discharged claimant who, in response to he and two other co-workers being reprimanded, posted on Facebook that his boss was "such a NASTY M******F***ER don't know how to talk to people!!!!!! F*** his mother and his entire f***ing family!!! What a LOSER!!!! Vote YES for the UNION!!!!!!" because, while on the edge of abusive behavior, the incident took place in the context union organization and management had been threatening to discipline or discharge workers who engaged in organizing activities); Appeal Board No. 563732 (involving *Pier Sixty, LLC* employee)(board affirmed decision of ALJ finding the employer's general policy against harassing co-workers was too vague to put the claimant on notice that his post could place his job in jeopardy by the posting); *Plaza Auto Center, Inc.* 355 NLRB No. 85 (2010) (employer violated NLRA where it fired employee who called his employer a "f***ing crook" and an "a**hole" in a meeting about his pay rate).

[191] *NLRB v Washing Aluminum Co.*, 370 US 9 (1962) (employer violated NLRA by firing employees who walked out of the job in protest over cold working conditions without permission and in violation of employer's rule).

[192] NLRB Memorandum GC 15-04, Report of the General Counsel, March 18, 2015

- Confidentiality policies containing overly broad language about never discussing conversations that are meant to be private or internal to the employer, sharing employee information outside of work, blanket provisions to never discussing or disclosing details about the employer publicly, and prohibitions on disclosing information that may adversely affect the employer's interest, image or reputation.[193]
- Blanket policies requiring employees to be "respectful" and / or "courteous," absent sufficient clarification or context.[194]
- Policies that broadly restrict an employee's right to publicly discuss terms and conditions of employment and to criticize the employer's labor policies, to engage in debate with co-workers about work-related issues or that bar "negative" or "inappropriate discussions," without further clarification.[195]
- Policies that could be reasonably read to restrict an employee's right to communicate with the media, government agencies and third parties about wages, benefits or other terms of employment.[196]

For unemployment insurance purposes, if the evidence establishes the claimant's actions would be protected concerted activity under the NLRA, the claimant has not engaged in misconduct. Additionally, because of the wording of Labor Law §592 as it relates to the payment of unemployment benefits during industrial controversies, employees who engage in wildcat strikes (which are considered illegal under the NLRA and therefore not protected conduct) who are then discharged on the grounds of absenteeism, cannot be found to have engaged in misconduct for unemployment insurance purposes.[197] This is not the case with strikes that violate other laws.[198]

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[193] *Flamingo-Hilton Laughlin,* 330 NLRB 287, 288 n.3, 291-92 (1999); *but see, Lafayette Park Hotel,* 326 NLRB 824, 826 (1998), *enforced* 203 F.3d 52 (D.C. Cir. 1999) (broad prohibitions on disclosing confidential information are lawful so long as they do not reference information regarding employees or terms and conditions of employment).

[194] *Casino San Pablo,* 361 NLRB Slip Op. at 3 (December 16, 2014); *but see, Copper River of Boiling Springs, LLC,* 360 NLRB No. 60 (February 28, 2014) (rules prohibiting conduct amounting to insubordination or requiring cooperation with co-workers and management in the performance of work are legal as they would not be construed as limiting protected activities).

[195] *Triple Play Sports Bar & Grille,* 361 NLRB No 31, Slip Op. at 7 (August 22, 2014); *Hills & Dales General Hospital,* 360 NLRB No. 70, Slip Op. at 1 (April 1, 2014).

[196] *Trump Marina Associates,* 354 NLRB 1027 (2009).

[197] *Matter of Heitzenrater*, 19 NY2d 1 (1966); Appeal Board No. 585397, (Board held that employees who lose their job as a result of engaging in wildcat strike have not engaged in disqualifying misconduct); Appeal Board No. 528569 (no misconduct where pari-mutuel clerks engaged in a sick-out during the course of negotiations for a new collective bargaining agreement).

[198] *Matter of Rodriguez*, 32 NY2d 577 (1973) (food service worker at a non-profit hospital who engaged in a strike, contrary to the provisions of Labor Law § 713, which makes it unlawful for employees of a non-profit hospital or residential center to engage in a strike, was properly disqualified on the basis of misconduct).

It is important to note, even within the context of concerted activity, certain behavior by employees may result in a loss of protection under the Act. Reckless or malicious behavior, such as sabotage, threatening violence, spreading lies about a product or service or revealing trade secrets, may cause concerted activity to lose its protection.[199] To determine whether an employee's conduct is so egregious as to lose protection under the Act, National Labor Relations Board generally applies a four part test: the place of the discussion; the subject matter of the discussion; the nature of the outburst; and whether the outburst was provoked by an unfair labor practice.[200]

[199] *NLRB v. Local Union 1229, IBEW (Jefferson Standard),* 346 US 464 (1953) (employer did not violate NLRA by discharging employees who distributed handbills disparaging quality of employer's television broadcasts but had no discernible relation to a pending labor controversy); *Richmond District Neighborhood Center,* 361 NLRB No. 74 (2014) (employer did not violate NLRA when it fired employee for making Facebook comments that would jeopardize the program's funding and safety of the youth it served).

[200] *Atlantic Steel Company,* 245 NLRB 814 (1979) (Board applied four-part test to determine that claimant's act in calling his supervisor a "lying son of a bitch" [or possibly, a "lying m*****f***er"] after the supervisor appropriately answered a question raised by the claimant was found to be unprotected activity).